No. (1)

FILED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

FUTURA DEVELOPMENT OF PUERTO RICO, INC.,

Petitioner,

against,

ESTADO LIBRE ASOCIADO DE PUERTO RICO,
THE COOPERATIVE DEVELOPMENT ADMINISTRATION,
THE COOPERATIVE DEVELOPMENT COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ALAN M. DERSHOWITZ
1575 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4617
COUNSEL OF RECORD

NATHAN Z. DERSHOWITZ
AMY ADELSON
GEOFFREY WOODS
Of Counsel

Attorneys for Petitioner
FUTURA DEVELOPMENT OF
PUERTO RICO, INC.

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QUESTIONS PRESENTED FOR REVIEW

I. Whether this Court should heed the recommendation of the First Circuit that this case would be "well-served" by the Court's "attention," and clarify whether Peacock v. Thomas deprives a federal court of jurisdiction to enforce a prior judgment against an "alter ego" of the judgment debtor when the plaintiff's claim is not based on a new theory of liability.

II. Whether the Commonwealth of Puerto Rico is "one of the United States" protected from suit by the Eleventh Amendment to the United States Constitution.

LIST PURSUANT TO RULE 14(1)(b) AND RULE 29.6

The following are all the parties to this proceeding:

1. Petitioner Futura Development of Puerto Rico, Inc. ("Futura"), formerly MD Construction Company, Inc..

2. Estado Libre Asociado de Puerto Rico, also known as the Commonwealth of Puerto Rico.

3. Administracion de Fomento Cooperativo, also known as Adminstration of Cooperative Development.

4. Compania de Desarrollo Cooperativo, also known as Cooperative Development Company.

5. The Honorable Rafael Hernandez Colon and his spouse, Lila Mayoral de Hernandez, and their Conjugal Partnership.

6. Hector Rivera Cruz and his spouse, "Rosa" Rivera, and their Conjugal Partnership.

7. Jesus I. Feliciano Oliveras and his spouse, "Janet" Feliciano, and their Conjugal Partnership.

8. Jose M. Berrocal and his spouse, "Judith" Berrocal, and their Conjugal Partnership.

9. "John Does Nos. 1-5" and their spouses "Jane Does Nos. 1-5," and their Conjugal Partnerships.

Futura is an affiliate of April Industries, Inc., which, in the past, did issue shares to the public. Both companies are now privately owned. There are no other parent or subsidiary companies.

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OPINIONS BELOW

The Opinion by the Court of Appeals for the First Circuit is reported at 144 F.3d 7 (1st Cir. 1998), and is set forth in the Appendix at App. 1. The Opinion and Order of the District Court for the District of Puerto Rico is reported at 962 F. Supp. 248 (D.P.R. 1998) and is set forth in the Appendix at App. 20. The Opinion and Order of the District Court denying the defendants' motion to amend the judgment is unreported and is set forth in the Appendix at App. 46.

JURISDICTION OF THIS COURT

The judgment of the Court of Appeals for the First Circuit was entered on May 6, 1998. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Eleventh Amendment to the United States Constitution provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

28 U.S.C. § 1367(a) provides, in pertinent part, that:

> in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the

action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

STATEMENT OF THE CASE

1. Introduction

Based on an expansive interpretation of Peacock v. Thomas, 516 U.S. 349 (1996), the Court of Appeals for the First Circuit, with great reluctance, ordered the dismissal of a claim by petitioner Futura Development of Puerto Rico, Inc. ("Futura") to enforce a judgment against the Commonwealth of Puerto Rico (the "Commonwealth"), and one of its agencies, the Administracion de Fomento Cooperativo ("AFC").[1] The First Circuit characterized its own decision as a "manifest injustice," compelled by a reading of Peacock that led to "unjust consequences." The First Circuit acknowledged that its reading could be erroneous since Peacock was "not altogether clear." (App. 18-19) Obviously troubled by whether it had correctly interpreted Peacock, the First Circuit ended its opinion by noting that "this case might well be served by the Supreme Court's attention." (App. 19)

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[1] AFC is an instrumentality of the Commonwealth, created in order to promote and give economic assistance to the development of the cooperative industry. Title 5 Laws of Puerto Rico Annotated, Section 931a, f and c. It is governed by an Administrator, who is appointed by the Governor. 5 LPRA § 931b. AFC is an arm of the Commonwealth. Cancel v. San Juan Construction Co., Inc., 387 F. Supp. 916 (D.P.R. 1974).

This Petition asks this Court to accept the First Circuit's unique invitation to review this case in order to clarify whether Peacock truly demands "unjust consequences." (App. 19)

The Petition also raises another important question. Although denouncing the Commonwealth's "clever use" of "its sovereignty to shield itself from the consequences of its actions" (App. 18), the First Circuit, as it has done repeatedly over the years,[2] blanketed the Commonwealth with the constitutional immunity accorded to a State by the Eleventh Amendment to the United States Constitution.

Whether the Commonwealth of Puerto Rico should become "one of the United States" is a passionately debated political question. The decision of the First Circuit in this case -- finding the Commonwealth's conduct "despicable" and noting that "it may result in hesitation by contractors to do business with public corporations funded by Puerto Rico, as well as other dire consequences for its financial reputation" (App. 15) -- could very well influence that public debate. It is time for this Court to finally address the underlying legal question presented in this and countless other litigations where the Commonwealth has relied on its purported "statehood" in an effort to avoid its obligations: is the Commonwealth of Puerto Rico "one of the United States" entitled to Eleventh Amendment immunity.

2. The Earlier Litigation

This litigation stems from a series of agreements entered into in 1978 by, among other parties, Compania de Desarrollo Cooperativo ("CDC"), a public corporation and

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[2] The First Circuit has jurisdiction over the Commonwealth of Puerto Rico so it has provided the definitive law in this country on this question.

instrumentality of the Commonwealth,[3] and MD Construction Co. ("MD"), a predecessor in interest to Futura. The agreements provided for the acquisition of land by MD and the construction of 700 low income housing units, to be known as the Ciudad Cristiana project. CDC was to finance the construction.

After completion and delivery of only 480 units, CDC unilaterally terminated the project. Absent funds, MD could not proceed and it defaulted on its obligations to the other parties to the agreements. Although CDC terminated the project for both political and financial considerations, it publicly claimed that it did so because the Ciudad Cristiana land was contaminated by mercury. (JA 431-36)[4]

In 1983, after CDC breached its agreement, one of the parties to the agreements brought an action in the District Court for the District of Puerto Rico against MD and CDC. MD crossed claimed against CDC and CDC counter-cross claimed against MD for millions of dollars. CDC also

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[3] CDC is a public corporation that was created in 1966 by the Puerto Rico Legislative Assembly "to develop activities and facilities that will further the swiftest expansion of the Puerto Rican cooperative movement." Title 5 Laws of Puerto Rico Annotated, Section 981(b). CDC is governed by the Administrator of AFC, who appoints the Executive Director of CDC. 5 LPRA § 981d(c) and 981j(a). CDC has always been administratively controlled by the Commonwealth, its principal source of income has always come from Commonwealth legislative appropriations, and CDC's own financial statements have always referred to CDC as a Commonwealth "agency." (App. 32-33; JA 2681-86)

[4] "JA" refers to the Joint Appendix filed in the First Circuit. "VAC" refers to the Verified Amended Complaint.

counter-claimed against the original plaintiff.[5] At the trial, there was extensive scientific evidence refuting any claim of mercury contamination, as well as compelling evidence that the entire contamination scare was fabricated by the Commonwealth and/or its officials for political reasons. The jury utterly rejected the allegations of mercury pollution and found for MD.

On June 29, 1987, judgment was entered against CDC and in favor of MD in the amount of $12,266,000 (the "judgment"). CDC appealed, and, on October 25, 1988, the Court of Appeals for the First Circuit affirmed the judgment. U.S.I. Properties, Corp. v. M.D. Const. Co, Inc., 860 F.2d 1 (1st Cir. 1988). A year later, this Court denied CDC's petition for a writ of certiorari. Compania De Desarrollo Cooperativo v. U.S.I. Properties Corp., 490 U.S. 1065 (1989).

3. The Involvement of the Commonwealth in the Earlier Litigation

Although CDC was formally the party to the original District Court action, the litigation was directed by and under the control of the Commonwealth. CDC's lawyers were hired and paid for by the Commonwealth. (JA 117-20, 123, 202-225, 243-47) CDC turned over all relevant documents to the Secretary of Justice -- the "attorney for the government of Puerto Rico." (App. 36; JA 186-87, 207-13) The District Court Judge who presided over the trial found that CDC had "little or no input" in the litigation process and that decisions rested with the law firm hired by the Commonwealth and "the local Department of Justice." (App. 37; JA 190-91) And, CDC's own lawyer, in his summation, stressed to the jury

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[5] On October 14, 1983, CDC also sued MD in the Superior Court of Puerto Rico, San Juan Part, Civ. No. 83-5384 (807), based on similar claims.

"that it [is] the government of Puerto Rico, you, the taxpayers, who [are going] to foot the bill" if CDC is found responsible. (App. 36; JA 126, 259)

The Commonwealth's entanglement with CDC and the MD judgment continued after the trial was over. Shortly after the judgment was entered, CDC's Executive Director wrote the Governor of the Commonwealth expressing concern over the impact of the judgment on CDC's financial situation, and requesting a special monetary appropriation from the Commonwealth to pay the judgment. (App. 37-38; JA 773-801) The Governor's advisors responded by requesting special allocations to pay CDC's legal fees, bond the judgment, and otherwise deal with the impact the judgment would have on the budget of the government agency that controlled CDC, CDC's alter ego, AFC.

On November 24, 1987, the District Court ordered execution of the judgment. (JA 253) In order to stay execution, CDC was required to post a supersedeas bond. To induce Futura to forego taking steps to protect its judgment, the lawyers for CDC, retained and paid for by the Commonwealth, represented to Futura that the Commonwealth would include payment of the MD judgment in its budget. (App. 36; JA 123-24, 126, 248-53)

Futura, relying on the Commonwealth's representation, did not insist on the posting of a bond and did not take steps to protect or execute on the judgment. Having successfully thwarted any collection efforts by Futura during the appellate process, the Commonwealth officially surfaced. The appeal to the Court of Appeals for the First Circuit and to this Court were both expressly handled by the Secretary of Justice, who, by statute, is authorized to represent the Commonwealth. (App. 37; JA 236-38)

4. The Commonwealth's Post Judgment Control of CDC to Avoid Payment of the Judgment

After the judgment was entered, despite the promise to Futura's counsel that the Commonwealth would include the judgment in its budget, the Commonwealth, which had always controlled CDC, meticulously orchestrated an unlawful "de facto liquidation" of CDC in an effort to avoid payment of the judgment. (App. 37-40)

First, the Commonwealth selectively decided which of CDC's debts would be paid, and made annual appropriations only for those debts, omitting mention of the judgment in CDC's post-judgment financial statements. (App. 38-39; JA 2091)

Second, the Commonwealth stripped CDC of assets. In 1988, CDC's budget, established by the Commonwealth, was over $5 million; in 1989, it was just over $4 million. In 1990, after the judgment became final, it was zero. (App. 38-39; JA 403-07, 2330-56)

Third, the Commonwealth required CDC to take steps that were against its own financial interest, for example, requiring CDC to make excessive lease payments to AFC. (VAC ¶¶ 75, 118, and 174, JA 114-17, 196-200, 3191-93, 3221-24, 3254)

Fourth, the Commonwealth stripped CDC of its employees, transferring them to AFC. (App. 40; JA 2330-56)

Fifth, the Commonwealth made CDC "disappear," removing it from all telephone listings, organizational charts and official government statements. (JA 389-96, 1074-1639, 2357-60)

In 1992, the Governor of the Commonwealth killed proposed legislation that would have lawfully dissolved CDC, and, although CDC was rendered insolvent, no statutory dissolution or liquidation of CDC ever took place. (App. 38; JA 744-58)[6]

In 1993, after reviewing a highly critical report from the Office of the Comptroller of Puerto Rico about the misuse of CDC funds, the Senate requested further information and was advised that the "legal" basis for the CDC "liquidation" was the MD judgment. (JA 2431-67, 2513-15)

5. The Instant Litigation

Faced with the fact that CDC was all but destroyed, Futura brought an enforcement action in the federal District Court of Puerto Rico against the Commonwealth, AFC and CDC seeking a declaration that CDC was the alter ego of both AFC and the Commonwealth, and an order compelling AFC and the Commonwealth to comply with the judgment. Futura also brought claims against various individuals, including the former Governor of the Commonwealth and the former Secretary of Justice, alleging, among other things, that those individuals, by orchestrating an unlawful dissolution of CDC to evade payment of the judgment, violated Futura's constitutional rights.

The Commonwealth, AFC and CDC moved to dismiss the claim on the basis of Eleventh Amendment immunity. The District Court rejected that claim, granting Futura summary judgment after finding that CDC was an alter ego of the Commonwealth, that the Commonwealth was a "de facto" party to the original litigation, and that the Commonwealth had waived any Eleventh Amendment claim by participating

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[6] Other public corporations have been lawfully dissolved and the creditors provided for. (VAC ¶¶ 149-152, JA 239-40)

in and asserting claims against MD in the earlier litigation. The Court also, sua sponte, dismissed the claims against the individual defendants.

As to the claim against the Commonwealth, the District Court had this to say:

> taken together, the Commonwealth's actions unequivocally demonstrate that the government had total control over CDC, its policy strategies, its litigation tactics, and even its existence. More importantly, the ... facts illustrate that the Commonwealth vigorously supported CDC: it stood behind CDC in filing an action of questionable merit in this Court, and when that backfired and resulted in an adverse judgment of $12.3 million, it sought to preclude collection of the same.
>
> The Commonwealth simply cannot expect to act as CDC's alter ego throughout the Ciudad Cristiana litigation in an effort to increase its own coffers, and hope that, when its plan boomerangs, this Court tolerates its effort to distance itself from CDC by pleading and interposing Eleventh Amendment immunity.

(App. 41-42)

After the Court entered Judgment requiring the Commonwealth to comply with the earlier judgment, the Commonwealth moved for reconsideration, raising for the first time the argument that, based on Peacock, the District Court lacked subject matter jurisdiction. The District Court rejected the Commonwealth's newly advanced argument, reiterating that the Commonwealth was a de facto party to the original litigation and that the Court had jurisdiction to enforce the

judgment against the Commonwealth since it was, in effect, a party to the original proceeding. (App. 46-54)

The Commonwealth, CDC and AFC appealed and Futura's cross-appealed the sua sponte dismissal of the claims against the individual defendants. The First Circuit, although characterizing the Commonwealth's conduct as "despicable," and warning that its refusal to pay the judgment "may result in hesitation by contractors to do business with public corporations funded by Puerto Rico," nonetheless felt compelled, on the basis of Peacock, to ignore the "equities of [the] case," and dismiss the claim against the Commonwealth, AFC and CDC on the ground that the federal court lacked subject matter jurisdiction. (App. 15-16)

The Court, however, reversed the sua sponte dismissal of the claims against the individual defendants. Nevertheless, although the survival of the individual claims could give rise to supplemental jurisdiction on the enforcement claim, pursuant to 28 U.S.C. § 1367(a), the First Circuit found that the enforcement claim only could be said to arise out of the same set of operative facts as the individual claims to the extent it alleged post-judgment misconduct on the part of AFC and the Commonwealth. And, as to that conduct, according to the Court, the Commonwealth of Puerto Rico was protected by Eleventh Amendment immunity. (App. 15-16)

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO CLARIFY THE EXTENT TO WHICH PEACOCK V. THOMAS DEPRIVED THE FEDERAL COURTS OF JURISDICTION TO ENFORCE THEIR JUDGMENTS

The First Circuit felt constrained by Peacock v. Thomas to dismiss a lawsuit that it plainly considered meritorious, leading to a result that it characterized as "unjust." The First Circuit, disturbed by the decision it felt compelled to reach, and unsure whether that decision was even mandated, urged this Court to grant certiorari in this case to clarify when federal courts retain the power to enforce their judgments. As the First Circuit observed, Peacock "is a relatively new case, and Circuit Courts are applying it differently." (App. 18-19) This case provides the perfect vehicle for this Court to clarify the extent to which Peacock altered historic concepts of ancillary jurisdiction.

In its claim to enforce the judgment, Futura asserted that CDC, AFC and the Commonwealth were the same entity, and that the Commonwealth and AFC were de facto parties to the earlier litigation and de facto judgment debtors. Futura could have sought to enforce the judgment against AFC and the Commonwealth through supplemental proceedings pursuant to Rule 69 of the Federal Rules of Civil Procedure. Instead, Futura commenced a separate lawsuit.

At that time, there was little question that the District Court had ancillary jurisdiction over the claim against AFC and the Commonwealth. A long line of cases decided by this Court had affirmed the power of the federal courts to entertain proceedings to protect and effectuate their judgments. See Riggs v. Johnson County, 73 U.S. (6 Wall) 166, 187 (1867) ("process subsequent to judgment is as essential to jurisdiction

as process antecedent to judgment, else the judicial power would be incomplete and entirely inadequate to the purpose for which it was conferred by the Constitution"); Root v. Woolworth, 150 U.S. 401, 410-12 (1893) ("it is wel' settled that a court of equity has jurisdiction to carry into effect its own orders, decrees, and judgments, which remain unreversed, when the subject matter and the parties are the same in both proceedings"); Local Loan Co. v. Hunt, 292 U.S. 234 (1934) ("that a federal court of equity has jurisdiction of a bill ancillary to an original case or proceeding in the same court, whether at law or in equity, to secure or preserve the fruits and advantages of a judgment or decree rendered therein, is well-settled"); Dugas v. American Surety Co., 300 U.S. 414, 426 (1937) ("The jurisdiction to entertain the supplemental bill is free from doubt...subject to the qualification that the relief be not of a different kind or a different principle").

While the lawsuit was pending, this Court decided Peacock v. Thomas, 516 U.S. 349 (1996). In that case, the plaintiff had originally brought an action against a corporation and its officer, Peacock, alleging violations of ERISA. The court dismissed the action against Peacock on the ground that he was not an ERISA fiduciary, but entered judgment against the corporation. The plaintiff then brought an independent action against Peacock alleging, among other things, that the corporate veil should be pierced and Peacock held responsible for the judgment because, after the judgment was entered, Peacock had engaged in various improprieties with the intent to defeat the judgment. There was no diversity between the plaintiff and Peacock.

This Court held that the lawsuit could not be maintained in federal court based on principles of ancillary jurisdiction. The basis for the Court's decision, however, is by no means clear. On the one hand, the Court reiterated the principle that a federal court has jurisdiction "over a broad

range of supplementary proceedings involving third parties to assist in the protection and enforcement of federal judgments." Id. at 356. On the other hand, the Court indicated that the federal courts do not have that jurisdiction over "a new lawsuit to impose liability for a judgment on a third party." Id. at 359. Thus, while in one breath, the Court reaffirmed that a federal court can exercise ancillary jurisdiction to enforce a judgment against a third party as part of its "inherent power to enforce its judgments," id. at 356, in the next breath, the Court seemed to preclude the exercise of that power whenever the claim to enforce the judgment is asserted in a new action.

The conflicting decisions by the courts below in this case reflect the confusion engendered by the Peacock decision. The District Court did not view Peacock as an impediment to its exercise of jurisdiction since, in its view, Peacock did not deprive the federal courts of the power to "effectuate their prior judgments as long as the relief is the same nature as that sought in the original action." (App. 48) Moreover, in its view, since the Commonwealth, AFC and CDC were one and the same entity, the claim by Futura against the Commonwealth was not a claim "against a third party not present in the original case," but was against a "de facto party to the original action." (App. 48)

The First Circuit, however, read Peacock far more broadly. In its view, Peacock precluded the exercise of jurisdiction in any "subsequent lawsuit" if there was any factual independence between the claim asserted in the earlier action and the claim asserted in the enforcement action.[3]

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[3] The First Circuit, although not addressing the factual finding that the Commonwealth was an "alter ego" of CDC, deemed the Commonwealth a "new party" because the Commonwealth and CDC were, in the Court's words, "separate jural entities." (App. 11)

(App. 9) Futura had argued that Peacock was distinguishable because it involved "a new action based on theories of relief that did not exist, and could not have existed, at the time the court entered judgment," 516 U.S. at 359, whereas the claim asserted by Futura was premised on CDC's status as an alter ego of the Commonwealth even before the judgment was rendered, and the Commonwealth's liability for that judgment at the time it was entered. Under the First Circuit's view, however, these distinctions were irrelevant because Peacock established a bright line test that would require an independent basis for jurisdiction any time a new action was commenced to enforce the judgment, regardless of whether the claim was predicated on a new theory of liability and regardless of whether the alter ego status predated entry of the judgment.[4]

Even the First Circuit acknowledged that its draconian reading of Peacock led to "unjust consequences." (App. 19) The Court also admitted that it could be wrong, that Peacock was "not altogether clear," and that different courts were applying it differently. (App. 18-19) The First Circuit, therefore, invited this Court to review this case to address whether Peacock intended to do away with the doctrine of ancillary jurisdiction whenever a new action was commenced to enforce a prior judgment. (App. 19)

This Court should accept that invitation. Whether Peacock constitutes a radical departure from prior principles of ancillary jurisdiction, as the decision by the First Circuit seems to suggest, or simply limits that jurisdiction when a newly asserted claim rests on a new theory of liability (the position argued by Futura in the courts below), is a question

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[4] The First Circuit did not address whether an independent basis for jurisdiction would be required in a Rule 69 supplemental proceeding, a question also left open in Peacock. 516 U.S. at 356, n.6.

that must be answered if the federal courts are to understand the scope of their enforcement powers.

Unquestionably, the lower courts are grappling with how to interpret Peacock. Some courts have read Peacock as permitting the exercise of ancillary jurisdiction over a claim against a new party to enforce a judgment against that party, even based on a new theory of liability, provided the proceeding is in the "original action rather than by means of a new suit." Wilson v. City of Chicago, 120 F.3d 681 (7th Cir. 1997). See also Yang v. City of Chicago, 137 F.3d 522 (7th Cir. 1998); Thomas, Head and Greisen Employees Trust v. Buster, 95 F.3d 1449, 1454 (9th Cir. 1996), cert. denied, 117 S. Ct. 1247 (1997). A few courts, however, have read Peacock more narrowly, allowing the exercise of ancillary jurisdiction, even over a subsequent action, if the claim asserted is truly ancillary to the original claim. See, e.g., Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc., 85 F.3d 1282 (7th Cir. 1996); Home Corp v. deLone, 1997 WL 214849 (E.D. Pa. 1997).

We submit that there should not be one set of rules for supplemental proceedings and another for so-called "new actions." Such a distinction, which exalts form over substance, makes no sense. It would permit virtually any Rule 69 supplemental proceeding to give rise to ancillary jurisdiction, while the exact same claim asserted in a separate action in the same court would not. Indeed, under this bright line approach, a federal court would have the power to entertain a supplemental proceeding involving a new party and an entirely new set of facts, but would be powerless to effectuate a prior decree if the plaintiff mistakenly sought to enforce a judgment predicated entirely on pre-existing liability in a "new action."

This Court should make it clear that the crucial question is not whether a new index number has been

purchased, but whether the enforcement claim is genuinely ancillary to the claim which gave rise to the judgment. Under this approach, if the claim could have been brought in a supplemental proceeding, the fact that it is asserted in a "new action" would be of no consequence. Likewise, if, as the District Court found here, the party against whom the judgment is sought to be enforced was an alter ego of the judgment debtor at the time the judgment was entered, a federal court would retain the "inherent power" to enforce that judgment even in a "new action." In short, the critical question should not be whether a new lawsuit has been commenced, but whether the enforcement action is based on a theory of relief that existed at the time the judgment was entered.

In Peacock, this Court recognized that some degree of enforcement power must rest with the district courts in order to "prevent wholesale fraud" upon the courts. 516 U.S. at 359. The Commonwealth of Puerto Rico has perpetuated a "wholesale fraud" on the federal courts and has escaped the consequences of its actions because of the First Circuit's expansive reading of Peacock. The First Circuit, however, stressed that this case would be "well-served" by this Court's attention. (App. 19) This Court should respond to that entreaty and grant review.

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE WHETHER THE COMMONWEALTH OF PUERTO RICO IS A "STATE" ENTITLED TO ELEVENTH AMENDMENT IMMUNITY FROM SUIT

Throughout these proceedings, both the Commonwealth and AFC have asserted that they are immune from suit pursuant to the Eleventh Amendment to the United States Constitution, which provides that:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const., Amend. XI (emphasis added).

The language of the Eleventh Amendment is clear and unambiguous. It deprives the federal courts of jurisdiction over "one of the United States." The Commonwealth of Puerto Rico is not "one of the United States." Indeed, whether the Commonwealth should become "one of the United States" is one of the most hotly contested political issues in both Puerto Rico and this country. See, e.g., Lizette Alvarez, House Approves Measure On Self-Determination For Puerto Rico, N.Y. Times, March 5, 1998, at A24 (whether Puerto Rico should vote on statehood is a "delicate and hotly debated question"). See also Ramirez de Ferrer v. Mari Bras, 97 J.T.S. 134 (P.R. Sup. Ct. No. CT-96-14, November 18, 1997) (holding that Puerto Rico is a "country" and its citizens retain independent Puerto Rican citizenship, but engendering vigorous concurring and dissenting opinions on status of Puerto Rico).

Yet despite the clear language of the Eleventh Amendment, the First Circuit has repeatedly held, albeit without any serious analysis, that the Commonwealth is entitled not to the more limited immunity from suit ordinarily allowed to a foreign sovereign, but to the full constitutional immunity afforded by the Eleventh Amendment. See, e.g., Ezratty v. Commonwealth of Puerto Rico, 648 F.2d 770, 776 n.7 (1st Cir. 1981); Ramirez v. Puerto Rico Fire Service, 715 F.2d 694, 697 (1st Cir. 1983); Metcalf & Eddy, Inc. v.

Puerto Rico Aqueduct and Sewer Authority, 991 F.2d 935, 938 n.3 (1st Cir. 1993).[5]

This Court has not addressed this question. Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139, 141 n.1 (1993) (because Eleventh Amendment immunity claim not challenged, the Court "express[ed] no view on this matter"). It should. The question is important, it is squarely presented in this case, and it is ripe for review.

In this case, the District Court, while accepting the Commonwealth's right to assert Eleventh Amendment immunity, found that because CDC was an alter ego of the Commonwealth, the Commonwealth had waived its immunity by actively participating in the earlier litigation between MD and CDC, even asserting cross-claims and counterclaims, without raising any Eleventh Amendment defense. (App. 34-36)

The First Circuit did not address the waiver issue. Yet, in addressing Futura's argument that the District Court could exercise supplemental jurisdiction over the claim against the Commonwealth and AFC pursuant to 28 U.S.C. § 1367, the First Circuit reiterated its view that the Commonwealth is entitled to Eleventh Amendment immunity. According to the Court, while Futura's allegations of post-judgment misconduct

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[5] The First Circuit, in endowing the Commonwealth with Eleventh Amendment immunity, relied on a few District Court cases recognizing that the Commonwealth had "sovereign immunity." Carreras Roena v. Camara de Comerciantes Mayoristas, Inc., 440 F. Supp. 217, 218 (D.P.R. 1976), aff'd, 559 F.2d 1201 (1st Cir. 1977); Ursulich v. Puerto Rico National Guard, 384 F. Supp. 736 (D.P.R. 1974). But, while the principles may be similar, the constitutional immunity afforded by the Eleventh Amendment is far broader than sovereign immunity. See pps. 20-21, infra.

on the part of the Commonwealth might give rise to supplemental jurisdiction, the Commonwealth would then have "Eleventh Amendment immunity from the claim that would be virtually unassailable." (App. 13-14)

The First Circuit's view that the Commonwealth of Puerto Rico is protected by the Eleventh Amendment -- a view which it has refused to reexamine[6] -- is wrong and it should be corrected.

First, and foremost, by its very language, the Eleventh Amendment does not apply to Puerto Rico, which is not "one of the United States."[7]

Second, Congress has never enacted any legislation that would make the Eleventh Amendment applicable to the Commonwealth. Nothing in any of the statutes delineating the

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[6] In Metcalf & Eddy, the Court expressly "decline[d] the invitation" to readdress whether Puerto Rico should be treated as a State for Eleventh Amendment purposes. 991 F.2d at 939 n.3.

[7] As this Court has observed, Puerto Rico is not a State. Harris v. Rosario, 446 U.S. 651 (1980) (Congress "may treat Puerto Rico differently from States so long as there is a rational basis for its actions"). See also Trailer Marine Transport Corp. v. Rivera Vazquez, 977 F.2d 1, 7 (1st Cir. 1992); Guerrido v. Alcoa Steamship Authority Co., 234 F.2d 349, 352 (1st Cir. 1956). See generally Magruder, The Commonwealth Status of Puerto Rico, 15 U. Pitt. L. Rev. 1, 19 (1953) ("The status of the Commonwealth of Puerto Rico is still not the same as that of a State in the Federal Union.") Consequently, Puerto Rico is subject to some, but not necessarily all, of the constitutional provisions applicable to "one of the United States." Torres v. Commonwealth of Puerto Rico, 442 U.S. 465, 468-71 (1979).

relationship between the former territory of Puerto Rico, now the Commonwealth of Puerto Rico, has even hinted that the Commonwealth is covered by the Eleventh Amendment. See, the Foraker Act, 31 Stat. 77 (1900); the Organic Act of 1917, 39 Stat. 951 (1917); and the Puerto Rican Federal Relations Act, 48 U.S.C. § 731 et seq.

Indeed, when Congress intends the Commonwealth to be treated as a State, it says so directly. For example, the statute establishing diversity jurisdiction between citizens of different states defines "States" to include the Commonwealth of Puerto Rico, as well as the "territories." 28 U.S.C. § 1332(d). So do various statutes defining the scope of "full faith and credit." 28 U.S.C. §§ 1738A(b)(8) and 1738B(b).

In contrast, the courts of Puerto Rico are not treated as "State" courts for purposes of defining this Court's certiorari review. Compare 28 U.S.C. § 1257 (defining "highest court of a State" without including Commonwealth) with 28 U.S.C. § 1258 (providing for review of judgments of Supreme Court of Commonwealth).

Third, unlike the treatment accorded the Commonwealth by the First Circuit, the federal courts have not treated other territories as "States" for Eleventh Amendment purposes. See, e.g., Fleming Department of Public Safety, 837 F.2d 401, 404-05 (9th Cir.), cert. denied, 488 U.S. 889 (1988) (Northern Mariana Islands); Tonder v. M/V The Burkholder, 630 F. Supp. 691 (D.V.I. 1986) (Virgin Islands); Sakamoto v. Duty Free Shoppers, Ltd., 613 F. Supp. 381 (D. Guam 1983), aff'd, 764 F.2d 1285 (9th Cir. 1985), cert. denied, 475 U.S. 1081 (1986) (Guam).

Finally, whether the Commonwealth has constitutional immunity from suit or the more limited immunity afforded to foreign sovereigns is a matter of serious consequence. Unquestionably, Puerto Rico has the "attributes of a

sovereign." Porto Rico v. Rosaly y Castillo, 227 U.S. 270, 273 (1913); Richardson v. Fajardo Sugar Co., 241 U.S. 44, 46 (1916). It might well be covered by common law principles of sovereign immunity, or by the Foreign Sovereign Immunities Act, which, to some extent, codifies those principles. 28 U.S.C. § 1605 et. seq. But the immunity granted to a foreign sovereign is far less encompassing than the Eleventh Amendment. The Act, for example, provides for both explicit and implicit waivers of immunity. 28 U.S.C. § 1605(a)(1). It withdraws immunity when the action is based upon "commercial activity," or when the plaintiff raises certain property or tort claims. 28 U.S.C. § 1605(a)(2), (3), (4), & (5).

Eleventh Amendment immunity, unlike sovereign immunity, is virtually absolute. The waiver doctrine is strictly construed. See., e.g. Edelman v. Jordan, 415 U.S. 651, 673 (1974); Petty v. Tennessee Missouri Bridge Commission, 359 U.S. 275 (1959). And, there are no particular types of claims that can be asserted against a State without its consent, not even claims based on the State's egregious violation of a commercial obligation. See, e.g., In re Ayers, 123 U.S. 443, 504 (1887).

In this case, the Commonwealth, in the words of the First Circuit, "cleverly used its sovereignty to shield itself from the fair consequences of its actions." (App. 18) Perhaps were the Commonwealth protected only by the more limited immunity afforded foreign sovereigns, the Commonwealth would be more scrupulous in its business dealings, would honor its obligations, and would not behave in the "despicable" fashion decried by the First Circuit in this case. (App. 15) This Court should grant review to correct the First Circuit's erroneous reading of the Eleventh Amendment and to make clear the extent to which the Commonwealth of Puerto Rico is entitled to sovereign immunity.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ALAN M. DERSHOWITZ
1575 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4617

COUNSEL OF RECORD
Attorneys for Petitioner
Futura Development of
Puerto Rico, Inc.

Amy Adelson
Nathan Z. Dershowitz
Geoffrey Woods
Of Counsel

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 97-1602

FUTURA DEVELOPMENT OF PUERTO RICO, INC., ETC., ET AL.,
Plaintiffs-Appellees,

V.

ESTADO LIBRE ASOCIADO DE PUERTO RICO, THE COOPERATIVE DEVELOPMENT ADMINISTRATION, THE COOPERATIVE DEVELOPMENT COMPANY,
Defendant-Appellants.

No. 97-1603

FUTURA DEVELOPMENT OF PUERTO RICO, INC.,
Plaintiff-Appellant,

V.

ESTADO LIBRE ASOCIADO DE PUERTO RICO, THE COOPERATIVE DEVELOPMENT ADMINISTRATION, THE COOPERATIVE DEVELOPMENT COMPANY,
Defendant-Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF PUERTO RICO

[Hon. Salvador E. Casellas, U.S. District Judge]

Before

Torruella, Chief Judge,

Boudin and Stahl, Circuit Judges.

Jay A. García-Gregory, with whom Fiddler, González & Rodríguez, Paul B. Smith, Jr. and Smith & Nevares were on brief for appellant Commonwealth of Puerto Rico.

Alan M. Dershowitz, with whom Amy Adelson, Victoria B. Eiger, Nathan Z. Dershowitz, Dershowitz & Eiger, P.C., Geoffrey Woods and Woods & Woods were on brief for appellee/cross appellant Futura Development of Puerto Rico, Inc.

Cherie K. Durand, with whom Law Offices Benjamín Acosta, Jr. was on brief for defendants-appellees.

May 6, 1998

TORRUELLA, Chief Judge. In an earlier proceeding, the predecessor of plaintiff Futura Development of Puerto Rico, Inc. ("Futura") obtained a judgment against the Cooperative Development Company ("CDC"), a public corporation and instrumentality of the Commonwealth of Puerto Rico, in the amount of $12,266,000. See U.S.I. Properties Corp. v. M.D. Construction Co., 860 F.2d 1 (1st Cir. 1988). After CDC failed to satisfy the judgment, Futura brought this suit seeking a determination that CDC was an alter ego of the Commonwealth of Puerto Rico, and that, as a

de facto party to the earlier litigation, the Commonwealth was liable for the judgment. On this theory of recovery, Futura was awarded summary judgment. See Futura Devel. of P.R. v. Puerto Rico, 962 F. Supp. 248 (D.P.R. 1997). Futura also brought six other claims against individual government employees under various causes of action, all of which were dismissed by the district court sua sponte. See id. The parties cross-appealed to this court. We conclude that the district court acted without proper jurisdiction in awarding summary judgment to Futura on its alter ego theory and improperly dismissed the remaining claims against the individual defendants.

Background

On October 25, 1988, this court affirmed a district court judgment entered pursuant to a jury verdict against CDC for $12,266,000. See U.S.I., 860 F.2d 1. The jury found that CDC had unilaterally terminated a construction contract with M.D. Construction, predecessor in interest to Futura, which provided for the building of a low-income housing project called "Ciudad Cristiana." The jury in that case rejected CDC's cross-claims alleging that the Ciudad Cristiana property was contaminated with mercury. Jurisdiction in that case was premised entirely upon diversity. See id. Now, almost ten years later, this court is faced with the current dispute over satisfaction of that judgment.

CDC is a public corporation that was created by the Puerto Rico Legislative Assembly in order to develop housing cooperatives across Puerto Rico. See P.R. Laws Ann. Tit. 5, §§ 981 et seq. A majority of the CDC's budget each year is

provided by the Commonwealth. Since the original litigation, the Commonwealth has engaged in a de facto liquidation of CDC in order to avoid satisfying the sizable judgment pending against it. Specifically, the Commonwealth has failed to provide for satisfaction of the judgment in CDC's budgets, stripped CDC of its assets, transferred its employees, and replaced CDC in the organizational chart of Commonwealth agencies and public corporations. During its liquidation, CDC settled debts with some creditors, but not with Futura. CDC, insolvent and devoid of official responsibility, now exists in name only.

Futura, frustrated by these tactics, brought this suit against the Commonwealth in federal court under the court's enforcement jurisdiction.[1] Futura argues

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[1] Plaintiffs argue that the district court has jurisdiction over this claim under the doctrine of "ancillary jurisdiction" recognized in Dugas v. American Surety Co., 300 U.S. 414, 428 (1937). In Dugas, the Court reaffirmed the inherent power of federal courts to exercise jurisdiction in order to enforce their judgments in certain situations where jurisdiction would otherwise be lacking. Cf. Root v. Woolworth, 150 U.S. 401, 410-412 (1893) (the first Supreme Court case brought under such jurisdiction). Throughout, we will refer to this type of jurisdiction as "enforcement jurisdiction." We do so because the term "ancillary jurisdiction" is also used with reference to another common law concept of jurisdiction related to "pendent jurisdiction" whereby federal courts obtain jurisdiction over certain claims interposed by parties other than the plaintiff so as

that the Commonwealth of Puerto Rico is liable for the original judgment because it was a de facto party to the original litigation. This assertion is supported not only by the generally close relationship between the Commonwealth and the CDC, but specifically by the fact that the Attorney General of Puerto Rico took over the original litigation for CDC. Furthermore, in its closing argument to the jury in that original litigation, CDC argued that any judgment against it would have to be paid with Puerto Rico tax dollars.

The Commonwealth argues that, even if CDC were its "alter ego," it retains Eleventh Amendment immunity from this suit in federal court. Despite its active participation in the defense of the original suit and use of the "tax dollars"

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to avoid piecemeal litigation. See 28 U.S.C.A. § 1367, commentary (West 1993). While this other form of ancillary jurisdiction was joined with pendent jurisdiction and codified in 1990 under the rubric of "supplemental jurisdiction," enforcement jurisdiction remains a creature of common law. To prevent confusion, we will avoid references to ancillary jurisdiction wherever possible, referring instead to supplemental jurisdiction and enforcement jurisdiction. See Susan M. Glenn, Note, Federal Supplemental Enforcement Jurisdiction, 42 S.C. L. Rev. 469, 472 (1991) (urging that courts distinguish between the two forms of ancillary jurisdiction, adopt more precise terminology in these cases, and analyze questions of enforcement jurisdiction without reference to supplemental jurisdiction doctrine).

argument with the jury, the Commonwealth asserts that it did not implicitly waive its immunity. The district court disagreed, awarding summary judgment in Futura's favor on the first count, and dismissing sua sponte Futura's remaining claims against the individual defendants. See 962 F. Supp. at 257-58. Because we conclude that the district court acted without proper jurisdiction, we do not reach the questions raised regarding implicit waiver of Eleventh Amendment immunity.

Analysis

I. Enforcement Jurisdiction

The first question to be resolved in this case is whether the district court properly exercised jurisdiction over Futura's claim against the Commonwealth. The parties acknowledge that federal question jurisdiction is inapplicable to Futura's alter ego claim, and that the Commonwealth of Puerto Rico is not subject to diversity jurisdiction. Cf. 28 U.S.C. § 1332(d) (Puerto Rico treated as a "state" for purposes of the statute, and therefore not subject to diversity jurisdiction); Nieves v. University of P.R., 7 F.3d 270, 272 (1st Cir. 1993). Futura's primary jurisdictional argument is that federal jurisdiction over the alter ego claim against the Commonwealth of Puerto Rico is premised upon federal enforcement jurisdiction. However, in actions such as this, where the district court had original jurisdiction founded solely on diversity jurisdiction, extending enforcement jurisdiction over a non-diverse party without sound reasons for doing so may represent an impermissible expansion of federal jurisdiction. At the same time, it

is generally recognized that "without jurisdiction to enforce a judgment entered by a federal court, 'the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution.'" Peacock v. Thomas, 516 U.S. 349, 356 (1996) (quoting Riggs v. Johnson County, 6 Wall. 166, 187 (1868)). Futura argues that under the doctrine of enforcement jurisdiction, federal courts generally possess jurisdiction over new proceedings in which a federal judgment creditor seeks to impose liability for a judgment on a person or entity not named in the original judgment, even where there is no independent basis for federal jurisdiction. However, Futura's argument fails in light of recent Supreme Court doctrine.

In Peacock, the Supreme Court explained that it had "never authorized the exercise of [enforcement] jurisdiction in a subsequent lawsuit to impose an obligation to pay an existing federal judgment on a person not already liable for that judgment." Id. at 357. In that case, Thomas, the plaintiff, had obtained a large ERISA class action judgment against his former employer, Tru-Tech, Inc. Instead of paying the judgment, Peacock, an officer and shareholder of Tru-Tech, settled Tru-Tech's debts with other creditors, including himself, and ignored the debt owed to Thomas. After collection efforts proved unsuccessful, Thomas sued Peacock in federal court using a "veil-piercing" rationale. Despite the absence of an independent jurisdictional basis for the proceeding, the district and circuit courts agreed to exercise enforcement jurisdiction in piercing the corporate veil. The Supreme Court reversed, explaining that there was insufficient factual dependence

between the claims raised in Thomas' suits to justify the extension of enforcement jurisdiction. See id. at 354-55.

Through Peacock, the Court reaffirmed the doctrine that "[i]n a subsequent lawsuit involving claims with no independent basis for jurisdiction, a federal court lacks the threshold jurisdictional power that exists when ancillary claims are asserted in the same proceeding as the claims conferring federal jurisdiction." Id. at 355 (citing Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, ___, 114 S. Ct. 1673, 1671 (1994); H.C. Cook Co. v. Beecher, 217 U.S. 497, 498-99 (1910)). The Court reasoned that, while a proper exercise of enforcement jurisdiction will result in efficiencies which outweigh comity concerns, an exercise of enforcement jurisdiction over a factually independent proceeding has no practical benefit for judicial economy. See id. at 355-56. Where a plaintiff plans to use the federal court to examine the defendant's identity and finances, as Thomas did in his veil-piercing claim, the court is asked to delve into a new and separate matter, and an independent basis for jurisdiction is required. This situation is distinguishable from where a party uses a post-judgment proceeding to challenge or revisit an issue or determination made by the federal court in the original proceeding.

Futura attempts to distinguish Peacock on two grounds. First, Futura argues that, under Peacock, enforcement jurisdiction will only be refused where the new defendant's liability is premised upon that party's actions which took place after the original judgment was rendered. According to Futura, the Commonwealth's liability

stems from its actions before and during the original litigation, so Peacock is inapposite. This nuanced interpretation misses the rationale of the case.

Peacock holds that enforcement jurisdiction does not exist in a subsequent lawsuit to impose an obligation to pay an existing federal judgment on a new defendant whenever the new proceeding lacks factual dependence upon the old proceeding. Obviously, subsequent proceedings based upon defendant's actions occurring after the original proceeding will necessarily be factually independent from the primary proceeding.[2] However, Peacock is broader than that. Extending enforcement jurisdiction to factually independent subsequent proceedings will not serve the purpose of judicial efficiency whether those proceedings premise liability upon pre- or post-judgment actions. Peacock does not limit itself, explicitly or implicitly, as Futura argues. Moreover, Peacock's discussion of other relevant circuit and Supreme Court case law confirms that its holding is as broad as dictated by its logic.

The Peacock Court specifically declared that it had granted certiorari to resolve a split among the various federal

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[2] Enforcement jurisdiction can extend to post-judgment conduct in cases where mandamus is sought to force compliance with an existing judgment. However, it cannot extend to most cases that seek to assign liability for the judgment to a new party. See Peacock, 516 U.S. at 358 (citing Labette County Comm'rs v. United States ex rel. Mouton, 112 U.S. 217 (1884); Riggs, 6 Wall. (73 U.S.) 166).

courts of appeals. See id. at 352, comparing Thomas v. Peacock, 39 F.3d 493 (4th Cir. 1994); Argento v. Melrose Park, 838 F.2d 1483 (7th Cir. 1988); Skevofilax v. Quigley, 810 F.2d 378 (3d Cir. 1987) (en banc) and Blackburn Truck Lines, Inc. v. Francis, 723 F.2d 730 (9th Cir. 1984) with Sandlin v. Corporate Interiors Inc., 972 F.2d 1212 (10th Cir. 1992) and Berry v. McLemore, 795 F.2d 452 (5th Cir. 1986). In both Sandlin and Berry, the two cases that Peacock ultimately supports, the circuit courts refused to exercise enforcement jurisdiction over factually independent subsequent proceedings where the new defendants' liability was premised upon those parties' actions before the original judgments were rendered. Furthermore, in H.C. Cook Co. v. Beecher, a 1910 case reaffirmed by the Court in Peacock, the Court held that enforcement jurisdiction would be refused to parties attempting to make new defendants answerable for an earlier judgment. Beecher also involved alleged liability on the part of new defendants based upon those defendants' pre-judgment actions. See Beecher, 217 U.S. at 498-99; Thomas v. Peacock, 39 F.3d 493, 500-01 (4th Cir. 1994). The Peacock Court stated that Beecher was binding upon it. See 516 U.S. at 357-58. Thus it is clear that Peacock's holding is not limited to subsequent proceedings in which the new defendant's liability is premised upon that party's post-judgment actions.

Futura's other attempt to distinguish Peacock is futile as well. Futura claims that since the Commonwealth is the alter ego of CDC, the Commonwealth is not really a "new" defendant. According to this argument, whereas Peacock was not liable for the primary judgment until after the subsequent hearing, the Commonwealth was

liable to Futura from the moment that the jury returned its verdict in the original proceeding. Thus, the viability of Futura's argument depends entirely upon our ruling that, unlike a generic veil-piercing claim, which represents a substantive rule of liability, an alter ego claim is a mere factual determination that identifies an original judgment debtor.

Although we do not discount the possibility that some other alter ego claims can be so characterized, in this case, the Commonwealth and CDC are undeniably seperate jural entities, and CDC (but not the Commonwealth) was the original judgment debtor. See P.R. Laws Ann. tit. 5, § 981(d) (stating that the Commonwealth is not liable for the debts of CDC). It is clear, then, that this alter ego claim seeks to do more than simply identify the original judgment debtor.

It cannot be denied that this case is separate from the original proceeding. Like the veil-piercing claim in Peacock, an alter ego claim involves an independent theory of liability under equity, complete with new evidence. See Note, Piercing the Corporate Law Veil: The Alter Ego Doctrine Under Federal Common Law, 95 Harv. L. Rev. 853, 853 n.1 (veil-piercing and alter ego claims are part of the same doctrine).[3] Although a judgment entered pursuant to

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[3] Futura's argument that an alter ego determination fundamentally differs from a generic veil-piercing is somewhat undermined by Futura's own complaint, which declares that "[t]he corporate entity [sic] of CDC must be disregarded and its veil pierced, and [the Commonwealth] be declared the alter ego of CDC."

such a finding can affect previously existing judgments and other debts, the claim requires a subsequent and distinct inquiry from the court.

To adopt Futura's argument, we would be forced to treat the corporate form of CDC as a complete nullity -- to look through its legal identity to the party standing behind it -- and to do so under the guise of making a factual determination necessary to determine our subject matter jurisdiction over this case. Cf. United States v. United Mine Workers, 330 U.S. 258, 292 n.5 (1947). This would be an unwarranted expansion of our jurisdiction. Alter ego/veil-piercing claims involve a substantive theory for imposing liability upon entities that would, on first blush, not be thought liable for a tort or on a contract. See, e.g., Resolution Trust Corp. v. Smith, 53 F.3d 72, 79-80 (5th Cir. 1995); Thomas v. Peacock, 39 F.3d 493, 499 (4th Cir. 1994), rev'd on other grounds, 116 S. Ct. 862 (1996).

Thus, the Commonwealth is in the same position as the defendants in Beecher and Sandlin, who had also been sued under alter ego rationales. See Sandlin, 972 F.2d at 1217-1218. As previously discussed, Peacock supports both cases, wherein the federal courts ultimately refused to extend enforcement jurisdiction. Thus, insofar as alter ego theories require factually independent proceedings, they will not subvert the rule of Peacock. This rule is determinative in this case.

II. Supplemental Jurisdiction

In the alternative, Futura argues that its alter ego claim is within the district court's supplemental jurisdiction because

that claim is so related to its civil rights claims against the individual defendants, claims over which the court undeniably has original jurisdiction, that it forms part of the same case or controversy. See 28 U.S.C. § 1367. We do not find this argument persuasive.[4]

Although its alter ego has pre- and post-judgment components, Futura carefully crafted the allegations in its alter ego claim to emphasize the pre-judgment relationship between the Commonwealth and CDC. It stressed the close ties between CDC and the government that existed before and during the original case. It did so because its only chance to penetrate Puerto Rico's Eleventh Amendment immunity was to argue that the Commonwealth, through its behavior in the case, waived its immunity. Futura recognized that, were it to rely upon the Commonwealth's post-judgment liquidation of CDC in its alter ego claim, Puerto Rico would have Eleventh Amendment

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[4] We note that Futura did not plead supplemental jurisdiction as an alternative basis for jurisdiction over its alter ego claim. Nor has plaintiff moved to amend the jurisdictional allegations in its complaint pursuant to 28 U.S.C. § 1653. There is a legitimate question as to whether Futura may preserve its judgment simply by suggesting an alternative jurisdictional theory in its brief. See Limerick v. Greenwald, 749 F.2d 97, 100 n.2 (1st Cir. 1984) (doubting the applicability of 28 U.S.C. § 1653 in similar circumstances). However, because we conclude that we may not exercise jurisdiction over Futura's alter ego claim under 28 U.S.C. § 1367, we need not resolve this issue.

immunity from the claim that would be virtually unassailable, as no waiver of such immunity can be inferred from the Commonwealth's post-judgment conduct. Futura's alter ego claim simply cannot be saved by the argument that it forms part of the same case or controversy as the civil rights claims, all of which are premised upon post-judgment conduct. And even if we were to agree that there existed sufficient relatedness between Futura's claims against the individual defendants and the post-judgment components of Futura's alter ego claim to bring these components within our supplemental jurisdiction, the Eleventh Amendment would, for reasons already explained, render us powerless to grant Futura any relief against the Commonwealth.

In any event, we do not find sufficient relatedness between these claims because there is no common nucleus of operative facts shared by both the civil rights claims and the alter ego claim. See BIW Deceived v. Local S6, Indus. Union of Marine and Shipbuilding Workers, 132 F.3d 824, 833 (1st Cir. 1997) (federal courts may only assert supplemental jurisdiction under 28 U.S.C. § 1367 where the claims arise from the same "nucleus of operative facts"). The claims do not overlap in theory or chronology. The cases are sufficiently distinct to require an independent jurisdictional basis. Any holding to the contrary would be inconsistent with the jurisdictional requirements of section 1332, and thus in direct contravention of section 1367.[5]

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[5] Recognizing the possibility that Peacock might govern this appeal, Futura argues that an appropriate remedy is not a dismissal of this case, but rather a remand

As the district court observed, the Commonwealth of Puerto Rico "stood behind CDC in filing an action of questionable merit in this Court, and when that backfired and resulted in an adverse judgment of $12.3 million, it sought to preclude collection of the same." 962 F. Supp. at 257. Indeed the Commonwealth's treatment of M.D. Construction/Futura throughout these proceedings has been despicable, and may result in hesitation by contractors to do business with public corporations funded by Puerto Rico, as well as other dire consequences for its financial reputation. However, federal courts are of limited jurisdiction, and may not weigh the equities of a case until jurisdiction has been established. See Hercules, ___ U.S. at ___, 116 S. Ct. at 989. In this case, Puerto Rico, like any state, enjoys the sovereign privilege not to be sued in federal court under diversity. Having concluded that neither

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to the district court with instructions to deem the first cause of action in this case a motion under P.R. R. Civ. P. 59 for a declaratory judgment that the Commonwealth is the party in interest in the original litigation and required to comply with the judgment. However, we cannot do so. Having determined that federal courts have no enforcement or supplemental jurisdiction over this proceeding, we similarly have no authority for a declaration along the lines suggested by Futura. See Hercules, Inc. v. United States, ___ U.S. ___, ___, 116 S. Ct. 981, 989 (1996) (federal courts are "constrained by our limited jurisdiction and may not entertain claims 'based merely on equitable considerations.'") (quoting United States v. Minnesota Mut. Inv. Co., 271 U.S. 212, 217-18 (1926)).

enforcement nor supplemental jurisdiction exists over this suit, we must turn a blind eye to any perceived injustices delivered at the hands of the Puerto Rican government.[6]

III. Sua Sponte Dismissal of Futura's Other Claims

After awarding summary judgment for Futura on the first cause of action, the district court dismissed the six remaining causes of action Futura had brought against individual defendants. Although the district court's desire to dispose of these claims is understandable in light of its having provided for the full satisfaction of the original judgment through its award of summary judgment on the first cause of action, the sua sponte dismissal of these remaining claims was premature. Because we herein vacate the district court's award of partial summary judgment, these remaining claims become even more potentially significant.

This court has held that, in limited circumstances, sua sponte dismissals of complaints under Rule 12(b)(6) of the Federal Rules of Civil Procedure are appropriate. See Wyatt v. City of Boston, 35 F.3d 13, 14 (1st Cir. 1994). However, such dismissals are erroneous unless the parties have been afforded notice and an

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[6] Thus, we do not reach many of the substantive issues in this case, including whether CDC actually was an alter ego of the Commonwealth, whether the issue is precluded by a post-trial order in the earlier litigation, and whether Puerto Rico's 11th Amendment sovereign immunity applies to this claim.

opportunity to amend the complaint or otherwise respond. See id.; Street v. Fair, 918 F.2d 269, 272 (1st Cir. 1990) (per curiam); Literature, Inc. v. Quinn, 482 F.2d 372, 374 (1st Cir. 1973).

In this case, Futura's initial complaint contained four causes of action against individual defendants, each a government employee. The individuals were sued under the Equal Protection Clause, Due Process Clause, and for federal civil rights violations and tortious interference with contractual relationships under Puerto Rico law. These causes of action were improperly pled in the initial complaint because they contained insufficient factual allegations to establish a causal nexus between the named defendants' conduct and the alleged violations of law. See 962 F. Supp. at 257. After receiving various motions to dismiss and a Magistrate's Report and Recommendation that these claims be dismissed, the district court dismissed the claims without prejudice. Futura then filed an amended complaint, devoting sixty pages exclusively to detailed claims against the individual defendants. This amended complaint also contained two completely new claims under the Contracts Clause and Puerto Rican tort law. Without any notice to the parties in this case, the district court dismissed with prejudice all causes of action against the individual defendants. The district court cursorily concluded that "the amended verified complaint does not . . . cure the defects of the original one [because it] fails to draw a nexus between the individual defendants and the government's scheme to preclude payment of the judgment in his favor." Id. at 258.

The district court erred in dismissing these claims sua sponte without providing the parties with notice and an opportunity to respond. See Wyatt, 35 F.3d at 14. The amended complaint contained new causes of action and more specific allegations of fact. Futura reasonably believed that its amended complaint addressed the court's initial concerns, and was entitled to address any new or continuing infirmities that the court perceived.[7] Accordingly, the dismissal of these claims is reversed, and they are remanded for further proceedings.

Conclusion

For the reasons stated herein, we **vacate** the district court opinion as to count one of the verified amended complaint and **dismiss** that count. We **reverse** the district court's sua sponte dismissal of counts two through seven and **remand** those claims for further proceedings consistent with this opinion. Finally, we wish to note again the manifest injustice of the conduct of the government of the Commonwealth of Puerto Rico throughout this affair. It has cleverly used its sovereignty to shield itself from the fair consequences of its actions, and has been

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[7] We note that, upon review, we are unable to determine how the amended verified complaint fails to draw a sufficient nexus between the defendants and the alleged wrongdoing. Without opining as to the ultimate survivability of these claims under Rule 12(b)(6), we expect that, on remand, the district court will provide Futura with more guidance as to the perceived failings in the amended complaint.

aided by recent Supreme Court doctrine. Peacock, however, is a relatively new case, and circuit courts are applying it differently. Cf. Matos v. Richard A. Nellis, Inc., 101 F.3d 1193, 1195 (7th Cir. 1996) (remarking that after Peacock, it is "not altogether clear" in which types of federal litigation an independent ground of jurisdiction is necessary to pierce the corporate veil). As the doctrine of enforcement jurisdiction evolves, perhaps fewer unjust consequences will flow from it. This case might be well-served by the Supreme Court's attention.

No costs.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

FUTURA DEVELOPMENT OF PUERTO RICO, INC.	*	
Plaintiff	*	Civil No. 92-2534(SEC)
v.	*	
ESTADO LIBRE ASOCIADO DE PUERTO RICO, et al.	*	
Defendants	*	

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OPINION AND ORDER

This case is before the Court on plaintiff's request for reconsideration of our denial of a motion for partial summary judgment (Dockets # 18, 99). Plaintiff contends that the Commonwealth of Puerto Rico ("the Commonwealth") should be held accountable for the payment of a prior judgment by this Court, which declared the Cooperative Development Company ("CDC") liable to plaintiffs in the amount of $12.3 million, plus interest, and which CDC has been unable to pay because of insufficient assets.[1]

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[1] See U.S.I. Properties Corp. v. M.D. Construction Company, Inc.; et al., 83-2647(JAF). As of 1992, when this case was filed, the debt already amounted to at least $20 million. According to plaintiff, the per diem interest rate is accruing at $4,032.79.

Upon careful examination of the parties' arguments as well as the relevant facts and the applicable law, this Court finds that plaintiff's motion should be **GRANTED**. In doing so, we heed Justice Brennan's dissenting opinion in Complete Auto Transit. Inc. v. Reis, 451 U.S. 401 (1981), in which he stated that "we have moved away from 'The King can do no wrong.' Th[e] principle of individual accountability is fundamental if the structure of an organized society is not to be eroded to anarchy and impotence, and it remains essential in civil as well as criminal justice." Id. at 429.

Jurisdiction

Federal Courts have jurisdiction to entertain supplemental actions "in aid of and to effectuate [their] prior decree[s] to the end either that [they] may be carried fully into execution or that [they] may be given fuller effect ..." Dugas v. American Surety Co. of New York, 300 U.S. 414, 428 (1937). Such bills are "ancillary and dependent, and therefore the jurisdiction follows that of the original suit, regardless of the citizenship of the parties to the bill[s] or the amount in controversy." Id. See also Crosby v. Mills, 413 F.2d 1273 (10th Cir. 1969). Were that not the case, "[t]he judicial power would be incomplete, and entirely inadequate to the purposes for which it was intended." Sandlin v. Corporate Interiors, Inc., 972 F.2d 1212, 1216 (10th Cir. 1992) (*referring to* Bank of the United States v. Halstead, 10 Wheat. 51, 23 U.S. 51, 53 (1825)).

Notwithstanding the forgoing, a party who asserts a post-judgment claim against a non-party which does not arise out of the operative facts that produced the original

judgment must demonstrate an independent basis for federal jurisdiction. Sandlin, 972 F.2d at 1216. "When post-judgment proceedings seek to hold non-parties liable for a judgment on a theory that requires proof on facts and theories significantly different from those underlying the judgment, an independent basis for federal jurisdiction must exist." Id. at 1217.

Given that plaintiff in the above-captioned matter asserts that the CDC--the judgment debtor--is the alter ego of the Commonwealth, who was not a named party to the previous action, this Court's jurisdiction over the instant action is contingent upon our determination that CDC is the alter ego of the Commonwealth, and that we are therefore, dealing with one and the same defendant. For the reasons stated below, this Court holds that CDC is an alter ego of the Commonwealth and that therefore, the latter was a *de facto* party to the original action. Supplemental jurisdiction does exist.

Procedural Background

This is the aftermath of the well publicized controversy over the "Ciudad Cristiana" housing project, which culminated in a trial that lasted five and a half weeks and resulted in a $12.3 million verdict for plaintiff, U.S.I. Properties Corporation, and co-defendant, MD Construction Company.[2] See U.S.I.

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[2] CDC had agreed to finance M.D. Construction's building of a 700-unit low income housing project, but after 480 units were completed, CDC stopped financing the project. Such an action forced M.D. to default on its payment obligations to

Properties Corp. v. M.D. Construction Co., 83-2647(JAF). Defendant CDC appealed from that judgment, which was affirmed in U.S.I. Properties Corp. v. M.D. Construction Company, Inc., 860 F.2d 1 (1st Cir. 1988). The United States Supreme Court denied CDC's petition for certiorari. See U.S.I. Properties Corp. v. M.D. Construction Corp., et al., 109 S.Ct. 2064 (1989).

Ten long years have already gone by since the original judgment was entered. In this, the latest chapter of the Ciudad Cristiana saga, Futura claims that it has been unable to collect any money at all because of CDC's insolvency. According to plaintiff, it is the Commonwealth who should be held accountable for the judgment because (a) the Cooperative Development *Company* ("CDC"), technically a public corporation under Puerto Rico law, is actually the alter ego of the Cooperative Development *Administration* ("AFC"), an agency which is an integral part of the Commonwealth government; (b) through its conduct before, during and especially after the U.S.I. Properties trial, the Commonwealth demonstrated that it had

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to the filing of the original suit. One of CDC's main defenses was that the land used to develop the Ciudad Cristiana project was contaminated with mercury. After a protracted litigation, the District Court held CDC responsible for its breach of contract. For a more detailed analysis of this litigation, please refer to U.S.I. Properties Corp. v. M.D. Construction Company, Inc., 860 F.2d 1 (1st Cir. 1988). M.D. Construction was subsequently merged into Futura Development of Puerto Rico, which became the judgment creditor against CDC.

Commonwealth demonstrated that it had absolute control over CDC and the entire Ciudad Cristiana litigation, to the point that it milked CDC of all its assets to preclude payment of the judgment; and (c) through such behavior, the Commonwealth voluntarily submitted itself to the jurisdiction of this Court and thus waived its Eleventh Amendment immunity.[3] We will analyze plaintiff's contentions in the order in which they have been alleged.

Summary Judgment Standard

As noted by the First Circuit,

> [s]ummary judgment has a special niche in civil litigation. Its role is 'to pierce the boilerplate of the pleadings and assay the parties' proof in order to determine whether trial is actually required.' Wynne v. Tufts University School of Medicine, 976 F.2d 791, 794 (1st Cir. 1992), *cert. denied*, 113 S.Ct. 1845 (1993). The device

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[3] Although plaintiff also sued various government officials for violations of civil rights, due process, equal protection, fraud and other torts, it acknowledged that "the heart and soul of the case is the alter ego relationship between the ELA, its agency, Administracion de Fomento Cooperativo (AFC) and CDC because it is through this relationship that the Commonwealth sought to accomplish, and did accomplish, its objective of not paying the MD Judgment and, equally important, of seeing to it that the MD Judgment was not paid (**Docket # 18, at 4-5**)."

> avoid full-blown trials in unwinnable cases, thus conserving the parties' time and money and permitting courts to husband scarce judicial resources.

McCarthy v. Northwest Airlines, Inc., 56 F.3d 313, 315 (1st Cir. 1995).

According to Fed. R. Civ. P. 56(c), a summary judgment motion should be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party, is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). See also NASCO, Inc. v. Public Storage, Inc., 29 F.3d 28 (1st Cir. 1994). It is not enough to conjure up an alleged factual dispute between the parties; to defeat summary judgment, there must exist a genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

For a dispute to be "genuine," there must be sufficient evidence to permit a reasonable trier of fact to resolve the issue in favor of the non-moving party. U.S. v. One Parcel of Real Property, 960 F.2d 200, 204 (1st Cir.1992). See also, Boston Athletic Assn. v. Sullivan, 867 F.2d 22, 24 (1st Cir. 1989). By like token, "material" means that the fact is one that might affect the outcome of the suit under the governing law. Morris v. Government Development Bank of Puerto Rico, 27 F.3d 746, 748 (1st Cir. 1994).

Recent case law has also established that "summary judgment may be appropriate '[e]ven in cases where elusive concepts such as motive or intent are at issue ...

if the non-moving party rests merely upon conclusory allegations, improbable inferences and unsupported speculation'." Woods v. Friction Materials, Inc., 30 F.3d 255, 259 (1st Cir. 1994) (quoting Medina-Munoz v. R.J. Reynolds Tobacco, Co., 896 F.2d 5, 8 (1st Cir. 1990)).

In determining whether to grant summary judgment, the Court may not, however, weigh the evidence. Casas Office Machines, Inc. v. Mita Copystar America, Inc., 42 F.3d 668 (1st Cir. 1994). Summary judgment "admits of no room for credibility determinations, no room for the measured weighing of conflicting evidence such as the trial process entails." Id. at 684 (citing Greenburg v. Puerto Rico Maritime Shipping Authority, 835 F.2d 932, 936 (1st Cir. 1987)). Accordingly, if the facts permit more than one reasonable inference, the court on summary judgment may not adopt the inference least favorable to the non-moving party. Casas Office Machines, 42 F.3d at 684.

In his second motion for reconsideration, plaintiff asserts that this Court should consider its summary judgment motion unopposed because defendants never submitted a statement of disputed material facts to counter plaintiff's more than 117 exhibits or its statement of uncontested material facts, even though Magistrate Justo Arenas ordered them to do so on August 8, 1995.[4]

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[4] The instant case was referred to Magistrate Justo Arenas for a report and recommendation on the parties' numerous motions to dismiss and for summary judgment. Upon analyzing these motions, Magistrate Arenas recommended that the

This Court has expressed that a non-moving party's failure to comply with Local Rule 311.12 will result in the admission of the moving party's list of uncontroverted facts.[5] Tavarez v. Champion

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dismissal of the alter-ego cause of action be denied until the Court determined whether CDC was the alter ego of the Commonwealth and whether it had waived its Eleventh Amendment immunity. As to the remaining causes of action, Magistrate Arenas recommended that they be dismissed (Docket # 62). In an opinion and order issued contemporaneously, Magistrate Arenas reprimanded both parties for failing to submit their respective Rule 311 statements in a timely manner (Docket # 61). Although plaintiff complied with this order shortly thereafter, defendant has yet to do so.

[5] Local Rule 311.12 provides that:

> [u]pon any motion for summary judgment, there shall be served and filed annexed to the motion a separate, short, and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried and the basis of such contention as to each material fact, properly supported by specific reference to the record. All material facts set forth in the statement required to be served by the moving party shall be deemed to be admitted unless controverted by the statement required to be served by the opposing party. The papers opposing a motion for summary judgment shall include a

Products. Inc., 903 F.Supp. 268, 270 (D.P.R.1995). "Although this omission does not signify an automatic defeat, it launches the non-movant's case down the road towards an easy dismissal." Id. Such is the scenario in the present case.

We further note that Local Rule 311.12 has the force of law. See Fed. R. Civ. P. 83; 12 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 3153 at 224 (1st ed.1973) ("[b]ecause local rules do have the force of law, they should be held to be binding upon the parties and upon the court that promulgated them until they are changed by a majority of the judges in the district.").[6] Accordingly,

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> separate, short, and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried, properly supported by specific reference to the record.

[6] The First Circuit has also stressed the importance of the parties' compliance with procedural rules. In Reyes-Garcia v. Rodriguez & Del Valle, Inc., 82 F.3d 11 (1st Cir. 1996), the Court noted that:

> [p]rocedural rules are important for two overarching reasons. One reason is that rules ensure fairness and orderliness. They ensure fairness by providing litigants with a level playing field. They ensure orderliness by providing courts with a means for the efficient administration of crowded dockets. In both these respects rules facilitate the tri-cornered communications

all material facts set forth in plaintiff's statement of undisputed material facts and which were not separately and expressly controverted by defendant will be deemed admitted. Rivas v. Federacion de Asociaciones Pecuarias, 929 F.2d 814, 816 n.2 (1st Cir. 1991); Laracuente v. Chase Manhattan Bank, 891 F.2d 17, 19 (1st Cir. 1989). There being no genuine issues of material fact, the case is ripe for summary judgment. We need only examine whether given the facts, the movant is entitled to judgment as a matter of law.

Applicable Law/Analysis

1. *Whether CDC is the alter ego AFC, and consequently, of the Commonwealth*

The First Circuit has consistently treated Puerto Rico as if it were a state for Eleventh Amendment purposes.[7] See,

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> that link the opposing parties with each other and with the court. The second overarching reason why procedural rules are important has a functional orientation: rules establish a framework that helps courts to assemble the raw material that is essential for forging enlightened decisions.

Id. at 14.

[7] Plaintiff requests that we challenge the forgoing holding based on the premise that Puerto Rico is a territory, subject to rules different from those of the fifty states. This Court declines plaintiff's invitation to question such a long-standing holding.

e.g., Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct and Sewer Authority, 991 F.2d 935, 939 (1st Cir. 1993). Pursuant to this holding, the Court has repeatedly held that "whether a local entity 'is to be treated as an arm of the state partaking of the State Eleventh Amendment immunity, or is instead to be treated as a municipal corporation or other political subdivision to which the Eleventh Amendment does not extend ... depends, at least in part, upon the nature of the entity created by state law'." Culebras Enterprises Corp. v. Rivera Rios, 813 F.2d 506, 516-17 (1st Cir. 1986) (citing Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274, 280 (1977)). See also In re: San Juan Dupont Plaza Hotel v. Tourism Company of Puerto Rico, 888 F.2d 940 (1st Cir. 1989).

Some of the factors which have been taken into consideration when determining whether a particular entity is a state's alter ego entitled to Eleventh Amendment immunity are "whether it performs a governmental function, whether it functions with substantial autonomy, to what extent it is financed independently of the state treasury, and if a judgment sought to be entered against the agency will be satisfied out of the state treasury." Figueroa-Rodriguez v. Aquino, 863 F.2d 1037, 1042 (1st Cir. 1988); Culebras Enterprises, 813 F.2d at 517. Also important are factors such as "whether [the entity] has the power to sue and be sued and to enter into contracts; whether its property is immune from state taxation, and whether the sovereign has immunized itself from responsibility for the [entity's] operations." In re San Juan Dupont Plaza Hotel, 888 F.2d at 942 (citing Ainsworth Aristocrat International Party v. Tourism Co., 818 F.2d 1034, 1037 (1st Cir. 1987)).

In Culebras Enterprises, the First Circuit held that the Culebra Conservation and Development Authority was the alter ego of the Commonwealth based on factors such as that: (a) it was attached to the Department of Natural Resources of Puerto Rico, where its main offices were located; (b) its board of directors included the Secretary of Natural Resources, presiding, and six others who were appointed by the Governor of Puerto Rico; (c) it was in charge of the formulation, adoption and administration of plans and programs for the conservation, use and development of Culebra, and of carrying out the public policy of the Commonwealth; (d) its property was exempt from taxation; (e) it could accept donations in the name of the Commonwealth; (f) it could acquire property through condemnation; (g) its president certified that the agency would not have the funds to satisfy a judgment and that such would have to be satisfied from the general budget of the Commonwealth; and (h) the entity did not have financial independence since it received its funds from the state treasury provided yearly in the general budget. Id. at 517. The Court ruled that, given the forgoing, it did not really matter that the Authority had the capacity to sue and be sued in the Puerto Rico courts. Id.

Similarly, in determining whether the Puerto Rico Tourism Company was an arm of the state, the court in In re San Juan Dupont Plaza Hotel considered that (a) there was constant communication between the executive branch and the agency's head; (b) the Governor appointed the members of the Tourism Company's board of directors; (c) the Governor determined who the Executive Director would be; (d) the Governor exercised significant control over

the planning and administration of the Tourism Company's policies; (e) three fourths of the Company's revenues came from the general fund of the Commonwealth through joint resolutions passed by the legislature every year; and (f) the company's director testified that payment of any judgment against the Tourism Company would have to be made by the Commonwealth. Id. at 943. Given these factors, the First Circuit held that the Tourism Company was immune from suit under the Eleventh Amendment notwithstanding the fact that the Puerto Rico law specifically provided that the Commonwealth would not be liable for the debts of the Company. Id.

Both of these cases are remarkably analogous to the case at bar. To begin with, the Supreme Court of Puerto Rico has commented that the CDC enabling statute is extremely vague. In Cintron Ortiz v. Compania de Desarrollo Cooperativo, CE-92-575, the Supreme Court noted that the statute was "extremely confusing in that it does not clearly define whether the Cooperative Development Company is or isn't an instrumentality of the Commonwealth." Moreover, this Court already held that as an agency, the Cooperative Development Administration ("AFC"), to which CDC is attached, was an integral part of the Commonwealth government. See Cancel v. San Juan Construction Co., 387 F.Supp. 916, 918-19 (D.P.R. 1974).

More importantly, however, are the following factors: (a) CDC's financial statements reveal that the company's principal source of income comes from appropriations made by the Legislative Assembly of the Commonwealth. In fact, the amount of CDC's capital that is derived from legislative appropriations has been

estimated at 97% of its total capital (**Docket # 38, at 70-71**); (b) the Commonwealth has acknowledged that additional special annual appropriations are made to certain component units (like CDC) to enable them to pay their debts (**Docket # 88, at 55**); (c) CDC's financial statements refer to CDC as an agency of the Commonwealth dedicated to the development of activities and facilities that foster and accelerate the fastest expansion of the cooperative movement in Puerto Rico (**Docket # 38, at 72**); (c) its enabling act provides that CDC will have a Finance Committee composed of the AFC administrator (who is named by the Governor of Puerto Rico) and four additional members named by the Governor of Puerto Rico (5 L.P.R.A. § 981d(e)); (d) the administrator of AFC is also the president of CDC (5 L.P.R.A. § 981d(c)); (e) CDC's executive director is named by the administrator of AFC, subject to the approval of the Governor of Puerto Rico (**Docket# 18, at 75**); (f) CDC's accounting system was to be established in consultation with the Secretary of the Treasury of Puerto Rico (5 L.P.R.A. § 981m(b)); (g) all the monies collected by CDC were to be entrusted to a depository recognized for funds of the Government of the Commonwealth (5 L.P.R.A. § 981(a)); (h) CDC's property and activities are exempt from taxes (5 L.P.R.A. § 981r); and (i) CDC is required to submit a financial statement and a transactional report to the Governor of Puerto Rico at the close of each fiscal year (5 L.P.R.A. § 981u). Given the forgoing, this Court has no doubt that, despite the fact that CDC's enabling statute specifically states that the bonds and obligations of the Company will not be paid by the Commonwealth, CDC is indeed its alter ego. The Eleventh Amendment thus comes into play, and so it becomes relevant

to determine whether, through its actions, the Commonwealth waived its immunity.

2. *Waiver of Eleventh Amendment Immunity*

The First Circuit has often held that "there are apertures in the Eleventh Amendment's protective swaddling. If a case falls within one of these gaps, the Eleventh Amendment will not bar maintenance of the suit in a federal court." Metcalf & Eddy, Inc., 991 F.2d at 938. "Specifically, the amendment's raiment unravels if any one of four circumstances eventuates: a state may randomly consent to suit in a federal forum; a state may waive its own immunity by statute or the like; Congress may sometimes abrogate state immunity; or under certain circumstances other constitutional imperatives may take precedence over the Eleventh Amendment's federal-court bar (citations omitted)." Id.

A state may waive its Eleventh Amendment immunity through its conduct. Garrity v. Sununu, 752 F.2d 727, 738 (1st Cir. 1984). See also 13 Wright, Miller & Cooper, Federal Practice & Procedure § 3524, at 160 (1984). Courts have, for example, inferred a waiver in cases such as this one, where the state makes a general appearance in federal court and defends a lawsuit on the merits. Hankins v. Finnel, 964 F.2d 853 (8th Cir. 1992) (referring to Sosna v. Iowa, 419 U.S. 393, 396, n.2 (1975) and Clark v. Barnard, 108 U.S. 436, 447-48 (1883)).[8] Furthermore, in cases

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[8] We note that in Hankins, the state appeared ex parte; whereas in this case, the state has appeared through its agency. For the reasons stated herein, however, *and*

where a governmental corporation has filed a counterclaim and a third-party complaint, Courts have had "little trouble concluding that [the corporation] voluntarily submitted to the jurisdiction of the federal court, thereby waiving any Eleventh Amendment immunity." Paul N. Howard Co. v. Puerto Rico Aqueduct & Sewer Authority, 744 F.2d 880 (1st Cir. 1984), cert. denied, 469 U.S. 1191 (1985).

Plaintiff contends that the Commonwealth's conduct prior to, during, and after the trial constitutes an unequivocal waiver of its Eleventh Amendment immunity. We will analyze plaintiff's assertions in that particular order.

That the Commonwealth was behind CDC's daily operations prior to the Ciudad Cristiana litigation is not in question. Plaintiff has already demonstrated that although CDC was in theory, a public corporation, in practice its policy-making endeavors were controlled by the Commonwealth. Furthermore, ninety-seven percent of its income came from yearly legislative appropriations.[9] Its financial statements for fiscal year 1987-88

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given the particular facts of this case, we believe this difference is insignificant.

[9] For example, a 1974 Joint Resolution of the Puerto Rico Legislature appropriated $3,500.000 to pay for certain CDC debts. In its statement of motives, the joint resolution states that "had these debts not been paid, not only the company's credit *but also the Commonwealth's credit* would have been affected (Docket # 15, Exhibit 11)."

specifically describe CDC as an agency of the Commonwealth which is financially maintained by legislative funds (**Docket # 38, Exhibit 2**). It is precisely for the forgoing reasons that we have held CDC to be the alter ego of the Commonwealth.

The important question, however, is whether at the time of the Ciudad Cristiana litigation, the Commonwealth acted as though it were defending an agency and, consequently, its own coffers. Plaintiff avers that although the Commonwealth never appeared as a party in the original litigation, it was the mastermind behind CDC's legal strategy. As an example, plaintiff asserts that Cesar Estrada, CDC's president, admitted in a deposition that he had never read any documentation regarding the Ciudad Cristiana case because they were in the Secretary of Justice's possession (**Docket # 13, Exhibit 3**). Estrada also acknowledged that all he knew from the case he had read in the newspapers (**Docket # 13, Exhibit 9**).

Most strikingly, plaintiff brings to our attention the fact that, in his closing arguments, counsel for CDC told the jury to make sure they understood that it was *the government of Puerto Rico* and consequently, its taxpayers, who were going to foot the bill if CDC was found responsible (**Docket # 13, Exhibit 18**). Plaintiff additionally points out that since CDC had been undercapitalized almost from its inception, Futura planned to attach the assets and/or require the posting of a *supersedeas* bond during the appellate process, but decided against it based upon CDC counsel's promise that the Commonwealth would include payment of the Ciudad Cristiana judgment in its budget (**Docket # 11, at 29**).

Plaintiff also notes that after judgment against CDC was entered in 1987, the appeal to the First Circuit, and subsequently, to the United States Supreme Court was handled by the Secretary of Justice and paid for by the Government of Puerto Rico. Moreover, plaintiff directs us to a post-judgment order by Judge Jose A. Fuste, who presided over the original litigation, in which he observes that "CDC, as an entity, had little or no intervention in the decision to deal with this unfortunate controversy the way that we saw it at trial.... [The] major litigation decisions rested with counsel, the law firm of Ramirez & Ramirez, and the local Department of Justice (Docket # 13, Exhibit 4)."[10]

Given the breadth of the Eleventh Amendment's protective mantle when it comes to the issue of waiver, the forgoing facts might not, standing alone, suffice to demonstrate a waiver through conduct. It is, however, the Commonwealth's course of conduct once the judgment against CDC became final that tips the balance in favor of plaintiff's argument and confirms any doubts which might have existed up to this point as to the Commonwealth's waiver.

After the Court entered its judgment against CDC in 1987, the company's Executive Director wrote the Governor to express concern about the agency's financial situation and the possibility that CDC's assets might be attached, affecting its operations and having an

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[10] The law firm of Ramirez & Ramirez represented CDC in the original litigation and was the Commonwealth's legal counsel in this case until January 4, 1993.

adverse ripple effect on other agencies, the government, and even private entities. Given CDC's precarious situation, he specifically requested a special monetary appropriation from the Commonwealth for the purpose of paying the Ciudad Cristiana debt (**Docket # 15, Exhibit 25**). Shortly thereafter, one of the Governor's aides referred the request to the Director of the Office of Budget and Management ("OBM"), asking him to deal with this situation which according to him, deserved special attention (**Docket # 15, Exhibit # 21**). Apparently, no further action was taken at the time.

In 1992, however, the director of the OBM prepared a proposed bill which provided for the liquidation and dissolution of CDC, as well as for the naming of a special trustee to carry out the liquidation, and sent it to the Governor's office (**Docket # 15, Exhibits 15-18**). In his letter, the Director of the OBM stated that the purpose of the liquidation proceedings would be to ensure compliance with the greatest possible number of CDC's financial obligations without jeopardizing the Commonwealth's assets. Id.[11]

Thus, despite CDC counsel's earlier assurances that the government of Puerto Rico would pay for the Ciudad Cristiana judgment, not only did the Commonwealth not follow through on its promise, but it selectively decided which of CDC's debts it would satisfy, and made annual

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[11] It is interesting to note that the Company's 1992-1993 financial statements reflected a net loss of $40.8 million and an accumulated capital deficit of $21 million.

appropriations to settle only those debts.[12] Some of CDC's post-judgment unaudited financial statements even disregard the debt relating to the Ciudad Cristiana litigation. For example, the Commonwealth reported CDC's debt as of June 30, 1991 to be $1,400,000, even though the debt at the time, including the Ciudad Cristiana judgment, surpassed $19,000,000 **(Docket # 15, Exhibit 56, at II-39)**. Moreover, CDC listed its 1988 budget at $5,465,652.00, its 1989 budget at $4,126,413.00, and its 1990 budget at *zero* **(Docket # 15, Exhibits 58-60)**. By substantially reducing CDC's legislative appropriations, as well as its budget, the Commonwealth, under its protective mantle, in effect allowed the company to gradually become insolvent and financially unable to pay the Ciudad Cristiana debt. Thus by 1993, its financial statements reflected a net loss of $40.8 million and an accumulated capital deficit of $21 million **(Docket # 38, Exhibit 3)**.

The forgoing facts all reflect that, as plaintiff claims, the Commonwealth

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[12] As evidenced in our footnote #8, this course of conduct is far removed from what had been the governmental policy prior to the Ciudad Cristiana judgment. In fact, the Commonwealth has historically come through to pay for the debts of its public corporations in order to guarantee that the credit of the corporations and the government remains in good standing. For example, the Commonwealth paid for the debts of corporations such as CRUV, the Metropolitan Bus Authority, the Commercial Development Co. and the Sugar Corp. after the Ciudad Cristiana judgment took effect **(Docket # 88, at 66-67)**.

engaged in a pattern of conveniently allowing CDC to fall into insolvency by refusing to provide the company with the necessary and customary appropriations, thus letting CDC's debts mount, wiping out its capital, and in effect, precluding the possibility of satisfying plaintiff's judgment, which constituted the lion's share of CDC's debt.

In addition to allowing CDC to be literally driven to the ground, the Commonwealth stripped the agency of its employees and transferred them to AFC. Thus, while CDC's 1988 budget lists the total number of employees at 28, its 1989 budget listed it at 23 and its 1990 budget listed it at *zero* **(Docket # 15, at 58)**. Meanwhile, AFC's personnel list increased from 135 in 1988 to 157 in 1989 **(Docket # 15, Exhibit 59)**. Moreover, if one examines the 1992-93 telephone directory, CDC appears listed with a phone number of 763-2009 for the switchboard and 759-9624 for its president; the same numbers listed for AFC. An identical listing appears in the 1993-94 directory, but surprisingly, CDC is not listed in the 1994-95 directory, despite the fact that the planned dissolution of CDC never materialized **(Docket # 38, Exhibits 5-7)**.

Further evidence of the questionable nature of CDC's de facto liquidation is the fact that in 1993, the Comptroller's office reported that CDC had violated the purpose for which it was created and engaged in a serious misuse of funds which led to its remaining inoperative since 1989 without undergoing appropriate liquidation proceedings **(Docket # 15, Exhibit # 72)**. As a result of these findings, the Senate requested further information from the OBM. In response to this request, the OBM

Director informed that CDC had not been included in the 1993-94 budget because the company had been liquidated and was inoperative since fiscal year 1989-90. While stating that the Commonwealth would not be responsible for CDC's debts, the Budget Director admitted that the legal basis for the company's liquidation and divestiture of its assets had been the federal court judgment against CDC (**Docket # 18, Exhibit 3**). The Senate's dissatisfaction with OBM's letter led to the filing of a petition to the Senate in October of 1993, to request that OBM provide additional information pertaining to the liquidation of CDC. (**Docket # 18, Exhibit # 4**). According to the record, however, no further action was taken on this matter.

Perhaps if we were to isolate each one of these incidents in our determination of whether to infer an Eleventh Amendment waiver, it would be difficult to do so. Nevertheless, taken together, the Commonwealth's actions unequivocally demonstrate that the government had total control over CDC, its policy strategies, its litigation tactics, and even its existence. More importantly, the forgoing facts illustrate that the Commonwealth vigorously supported CDC: it stood behind CDC in filing an action of questionable merit in this Court, and when that backfired and resulted in an adverse judgment of $12.3 million, it sought to preclude collection of the same.

The Commonwealth simply cannot expect to act as CDC's alter ego throughout the Ciudad Cristiana litigation in an effort to increase its own coffers, and hope that, when its plan boomerangs, this Court tolerates its effort to distance itself

The Commonwealth simply cannot expect to act as CDC's alter ego throughout the Ciudad Cristiana litigation in an effort to increase its own coffers, and hope that, when its plan boomerangs, this Court tolerates its effort to distance itself from CDC by pleading and interposing Eleventh Amendment immunity. As Chief Judge Torruella stated in his dissenting opinion in Figueroa-Rodriguez v. Aquino, 863 F.2d 1037 (1st Cir. 1988), "[h]aving one's cake and eating it, too, is not in fashion in this [Court]." Id. at 1052, referring to United States v. Tierney, 760 F.2d 382, 388 (1st Cir.1985).

Based on the forgoing, we hereby hold that the Commonwealth waived its sovereign immunity as to this case and must be responsible for the $12.3 million judgment, plus interest. Plaintiff's motion for partial summary judgment is hereby **GRANTED**.

Other Claims

Although in its second motion for reconsideration (**Docket # 99**), plaintiff merely requests that this Court rule on its motion for partial summary judgment (**Docket # 18**), we will examine the remaining claims to determine whether in its amended complaint, plaintiff cured the defects which caused these causes of action to be dismissed under Rule 12(b)(6) on September 29, 1995 (**Docket # 75**), pursuant to Magistrate Justo Arenas' Report and Recommendation (**Docket # 62**).

It is a well established principle that "[e]ven if a party does not make a formal motion, the court on its own initiative may note the inadequacy of the complaint and dismiss it for failure to state a claim as long as the procedure

employed is fair." 5A Wright & Miller, Federal Practice & Procedure §1357, at 301 (2d ed. 1990). The First Circuit has allowed *sua sponte* dismissals of complaints under Rule 12(b)(6) of the Federal Rules of Civil Procedure as long as the parties have been afforded notice and an opportunity to amend the complaint or otherwise respond. Wyatt v. City of Boston, 35 F.3d 13, 14 (1st Cir. 1994).

When evaluating a motion to dismiss under Rule 12(b)(6), the Court must assume that plaintiff's allegations are true and draw all reasonable inferences in its favor. Correa Martinez v. Arrillaga Belendez, 903 F.2d 49, 51 (1st Cir. 1990). Although the Court will not credit bald assertions or mere specious allegations, it will not dismiss a complaint for failure to state a claim "unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

Plaintiff filed the complaint in the instant action on October 28, 1992. Besides the alter-ego claim which we disposed of above, plaintiff filed a claim against various government officials in their official and personal capacities for violations of (a) the equal protection clause; (b) the takings clause; (c) the due process clause; and (d) plaintiff's civil rights. Plaintiff also included a claim for loss of reputation through tortious interference. Upon receipt of various motions to dismiss and for summary judgment, the Court referred this matter to Magistrate Justo Arenas for a Report and Recommendation. On August 9, 1995, Magistrate Arenas recommended that the case be dismissed as to all but the first (the

alter ego) cause of action. The Magistrate essentially held that plaintiff had "failed to plead any factual allegations which establish some sort of causal nexus or connection between the named defendants' conduct and the [alleged violations] (**Docket # 62**)." On September 29, 1995, we adopted his report and recommendation and entered partial judgment against plaintiff. Subsequently, however, we granted plaintiff an opportunity to submit an amended complaint to cure the defects which caused its complaint to be dismissed. The amended complaint was filed on February 13, 1996. It is over one hundred pages long and it includes causes of action under the alter ego doctrine, discussed above, as well as for equal protection, due process and civil rights violations. Plaintiff additionally includes claims for impairment of contracts obligations; loss of reputation and credit by tortious interference; as well as claims under local tort law (**Docket # 88**).

Although substantially longer than the original complaint, the amended verified complaint does not, however, cure the defects of the original one. Plaintiff fails to draw a nexus between the individual defendants and the government's scheme to preclude payment of the judgment in his favor. It merely realleges the same claims which it averred in the original complaint, detailing some of the examples alleged in the first cause of action against the Commonwealth. For example, in its equal protection claim, plaintiff asserts that the individual defendants "deliberately, intentionally and purposefully showed, preferred, and practiced undue individual and/or class favor in the payment, and/or causing the payment, of obligations and debts of CDC to the other creditors of CDC, while at the

same time showed and practiced hostile discrimination and/or oppression and unequal treatment under the law to judgment creditor Futura (**Docket # 88, at 39**)." Plaintiff does not specify who performed which acts. As much as this Court believes that plaintiff has made a strong showing that he has a cause of action against the Commonwealth for the payment of the Ciudad Cristiana judgment, we do not think his remaining claims, filled with conclusory assertions and specious allegations, warrant the same treatment. Plaintiff had ample time to substantiate his claims and cure any defects which might have caused the previous dismissal, and yet he failed to do so. Thus, upon close scrutiny of the first amended complaint, this Court finds that it suffers from the same infirmities as the previous complaint and hereby **DISMISSES** plaintiff's second, third, fourth, fifth, sixth and seventh causes of action. Judgment will be hereby entered accordingly.

SO ORDERED.

In San Juan, Puerto, this 18th day of March, 1997.

/S/
SALVADOR E. CASELLAS
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

FUTURA DEVELOPMENT OF PUERTO RICO, INC.	*	
Plaintiff	*	Civil No. 92-2534(SEC)
v.	*	
ESTADO LIBRE ASOCIADO DE PUERTO RICO, et al.	*	
Defendants	*	

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ORDER

This case is once again before the Court, this time on defendants' separate motions to alter or amend judgment under F.R.C.P. 52(b) and 59(e) (**Dockets #117; 118**).[1] Since defendants raise virtually identical issues in their motions, we will address them as one.

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[1] Rule 52(b) provides, in pertinent part, that "[u]pon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly." Rule 59(e) states that "[a]ny motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment."

It is well settled that motions filed under Rules 52(b) and 59(c) of the Federal Rules of Civil Procedure must be filed within ten days of the entry of judgment. See, e.g., Vargas v. Gonzales, 975 F.2d 916 (1st 1992); Feinstein v. Moses, 951 F.2d 16, 18 (1st Cir. 1991); Rivera v. M/T Fossarina, 840 F.2d 152 (1st Cir. 1988); Elias v. Ford Motor Co., 734 F.2d 463, 466 (1st Cir. 1984). See also 9A Wright & Miller, Federal Practice & Procedure § 2582, at 558. In this case, the Court entered judgment on March 20, 1997 (**Docket #111**). Defendants did not, however, file their motions until twelve days later, on April 7, 1997. Their motions are thus, untimely, and must be **DENIED**. Vargas v. Gonzales, 975 F.2d 916 (1st Cir. 1992); Boston Car Co. v. Acura Auto. Division, 971 F.2d 811 (1st Cir. 1992). See also 11 Wright, Miller & Kane, Federal Practice and Procedure § 2817, at 180 (2d ed. 1995).

Even assuming, *arguendo*, that the forgoing motions had been filed in a timely manner, the arguments set forth therein would not warrant the Court's reconsideration of its prior judgment. As state in F.D.I.C. v. World University, Inc., 978 F.2d 10 (1st Cir. 1992), Rule 59(c) motions should not be used either to relitigate old matters or to raise arguments which could have been raised prior to the judgment. See also 11 Wright, Miller & Kane, supra, §2810.1, 15 127-28. The arguments advanced by defendants were either brought to this Court before it rendered its judgment, or could have been brought at that time. Defendants had ample time to oppose plaintiff's motion for partial summary judgment, filed on May 8, 1996, yet they declined to do so. They cannot now depend upon Rules 52 and 59 to bring these matters to the Court's

attention.

There are, however, a couple of issues which the Court wishes to clarify for the record. First, defendants argue that this Court lacked jurisdiction to address plaintiff's post-judgment action under the ancillary jurisdiction doctrine, and that the cases cited by this Court in support thereof were inapposite. We would like to clarify that such cases were not cited for the proposition that they are similar or applicable to the instant matter, but rather because they demonstrate that district courts have jurisdiction to effectuate their prior judgments as long as the relief is of the same nature as that sought in the original action. More importantly, our jurisdiction is not premised upon our power to effectuate judgments against a third party, not present in the original case, but rather, on our understanding that the Commonwealth of Puerto Rico was a de facto party to the original action. Defendants' mention of the recent Supreme Court decision of Peacock v. Thomas, 116 S.Ct. 862 (1996), is thus, truly inapposite.

Secondly, defendants contend that this Court was estopped from finding that the Corporacion de Desarrollo Cooperativo ("CDC") was the alter ego of the Commonwealth of Puerto Rico ("the Commonwealth") because Judge Jose A. Fuste, in a post-judgment marginal order, held that CDC was "an entity created by law", and that he could "not see how CDC as a governmental entity c[ould] be an alter ego of the Commonwealth."

Although defendants cite various legal principles in support of their contention, the Court finds that the one precept which

is truly applicable to the instant matter is the "law of the case" doctrine. This principle "generally constrain[s] trial courts from reconsidering matters once decided during the course of a suit, but it is clear that federal courts retain the power to reconsider such issues if they wish." Alejo Jimenez v. Illeyliger, 792 F.Supp. 910, 919 (D.P.R. 1992). See also Northeast Utilities Service Co. v. Federal Energy Regulatory Comm'n, 55 F.3d 686, 688 (1st Cir. 1995)("[i]n this circuit the 'law of the case' doctrine has not been construed as an inflexible straightjacket that invariably required rigid compliance with the terms of the mandate."); Arizona v. California, 460 U.S. 605, 618, n.8 (1983)("[u]nder law of the case doctrine, it is not improper for a court to depart from a prior holding if convinced that it is clearly erroneous and would work a manifest injustice"). Such was the situation before this Court when it decided to entertain the alter ego issue once again.

Judge Fuste's ruling was premised on a discovery dispute; what he denied then was essentially plaintiff's request to depose a government official. At the time he rendered this order, most of the facts upon which we based our ruling almost nine years later were not yet available. Since the alter ego question was clearly at the crux of the instant controversy, we believed that a more exhaustive analysis was required in dispose of the issue, especially given the manner in which the First Circuit had addressed this matter in the past; see, e.g., Figueroa Rodriguez v. Aquino, 863 F.2d 1037 (1st Cir. 1988); Culebras Enterprises Corp. v. Rivera Rios, 813 F.2d 506 (1st Cir. 1986); In re San Juan Dupont Plaza Hotel v. Tourism Company

of Puerto Rico, 888 F.2d 940 (1st Cir. 1989). It is for the forgoing reasons that the Court revisited plaintiff's alter ego claim regardless of Judge Fuste's order.

As to defendants' arguments on the merits of the alter ego question, this Court would like to stress that the facts of this case cannot be dissected from each other, as defendants attempt to do. It is the totality of the circumstances which led the First District in the forgoing cases, as well as this Court in its March 20th opinion, to conclude that the entity under scrutiny (in this case CDC) was the alter ego of the Commonwealth. Furthermore, the Supreme Court decision of Hess v. Port Authority Trans-Hudson Corp., 115 S.C.t 394 (1994), which defendants cite in support of their assertion that CDC is not an arm of the state, pertains to the issue of waiver, and not of alter ego. What was at issue in Hess was the existence of a statutory waiver under the interstate Compact Clause. There is not even a brief mention of the alter ego doctrine. Finally, we would like to point out that, contrary to what defendants assert, our determination that CDC was the alter ego of the Commonwealth was clearly essential to our conclusion that, since the Commonwealth was a *de facto* party to the original proceedings, it had implicitly waived its Eleventh Amendment immunity.

Third, and most importantly, this Court would like to set the record straight as to the fact that the Eleventh Amendment immunity may be waived in a number of ways, and that courts have devised different standards to determine whether a waiver has, in fact, occurred. As we stated in our opinion and order, a state may waive its sovereign immunity (a) by randomly

consenting to suit in a federal forum; (b) by statute or the like; (c) through a Congressional abrogation of such immunity; and (d) given certain circumstances, if the Court finds that other constitutional imperatives take precedence. Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct and Sewer Authority, 991 F.2d 935, 938 (1st Cir. 1993). See also 13 Wright, Miller & Cooper, Federal Practice & Procedure §3524, at 160-64 (2d ed. 1984)("it is settled that a state may consent to suit in federal court. It also may waive its immunity by a voluntary appearance, by state statute, or other conduct in an action brought against it"). Defendants argue that this Court has misconstrued and/or clearly erred in its interpretation of the waiver doctrine because, e.g., "constructive waiver of Eleventh Amendment immunity is virtually nonexistent." (Docket #117, at 25). What defendants fail to realize is that Atascadero State Hospital v. Scanton, 473 U.S. 234, 238 (1985) and its progeny all address the question of *statutory waivers*. As defendants correctly assert, citing Erwin Chemerinsky's treatise on Federal Jurisdiction, among other sources, constructive waivers are rarely ever deduced from *statutory* provisions, federal or otherwise.[2] But in the instant action, this Court did not rely upon any statute to deduct that the Commonwealth had waived its immunity; rather, it relied upon the Commonwealth's *actions*.

Defendants argue that the facts upon which this Court bases its determination are "totally irrelevant to the question of waiver" (Docket #117, at 20). Yet the

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[2] See Erwin Chemerinsky, Federal Jurisdiction §7.6 (2d ed. 1994).

truth is that the *only* way to accurately determine whether the Commonwealth waived its Eleventh Amendment immunity through its conduct is, precisely, by examining the Commonwealth's conduct. Of course, a state's waiver of its sovereign immunity will always be of an exceptional nature, yet this Court strongly believes that the instant situation is truly *sui generis*, and warrants the conclusion that a waiver has indeed occurred, if only as pertains to the original judgment in this case. See Hankins v. Finnel, 964 F.2d 853, 856 ("[a]n Eleventh Amendment waiver need not be a general waiver, but may be a partial or limited one").[3] As with the alter ego question, it is not one particular fact but rather, the totality of the circumstances which tips the balance in favor of plaintiff in this case.

Finally, we would like to call attention to defendants' statement regarding our analysis of the relevant facts at issue. Defendants point out that "[a]mong the 'facts' reviewed by this Court are those advanced by Futura in various motions filed before this Court, and to which this Court apparently gives some credence and more importantly, weigh[sie]"

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[3] We also note that the cases of Garrity v. Sununu, 752 F.2d 727, 738 (1st Cir. 1984); and Hankins v. Finnel, 964 F.2d 853 (8th Cir. 1992); are cited for the sole proposition that a state may waive its sovereign immunity through its conduct. At no point do we propose, as defendants argue, that these cases are directly applicable to the instant matter. Please refer, e.g. to note 8 of our opinion and order, where we recognize that there is a difference between these cases.

(Docket # 117, at 20). We agree that we give credence and weight to the facts presented by plaintiff in its voluminous motion, but remind defendants that we are legally required to do so under Local Rule 311, and we state so in our opinion and order. See Docket #111, at 6-7. We would, however, like to take advantage of this opportunity to cite from a recent opinion from this Court, in which Judge Hector Laffitte eloquently addressed this issue:

> All too frequently, litigants before the District Court of Puerto Rico overlook the importance of the anti-ferret rule in the summary judgment stage: Local Rule 311.12. Without such a rule, the Court would have to search through the record, with or without the assistance of counsel, for lurking evidence of a genuine issue of material fact... Local Rule 311.12 prevents "the recurring problem of 'ferreting through the record'" and "the specter of district judges being unfairly sandbagged by unadvertised factual issues." ... It requires the party moving for summary judgment to file a separate, short, and concise statement of material fact in dispute. *These facts are deemed admitted unless the non-moving party files a similarly separate, short, and concise statement of material facts demonstrating that there is a genuine issue in dispute.*

Dominguez v. Eli Lilly & Co., 1997 WL 168621, at WL 1 (D.P.R. 1997). In the

instant action, not only did defendants fail to submit a statement of materials facts in dispute; but they failed to file an opposition at all. Under such circumstances, the least the Court could do is precisely to consider plaintiff's facts as admitted and to determine whether plaintiff was entitled to judgment as a matter of law. For the reasons stated in our opinion and order, we found that it was.

Based on the forgoing, defendants' motions (**Docket #117 and 118**) are hereby **DENIED.** Defendants should note that neither their filing of the Rule 59(e) motions nor the instant order has tolled the time for appeal. Vargas v. Gonzalez, 975 F.2d 916 (1st Cir. 1992); 11 Wright, Miller & Kane, supra §2817, at 180.

SO ORDERED.

In San Juan, Puerto Rico, this 17th day of April, 1997.

/S/
SALVADOR E. CASELLAS
United States District Judge